Supreme Court
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No. _____

In the
Supreme Court of the United States
October Term, 1994

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Plaintiffs - Appellants,

v.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Defendant - Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner seeks a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals reversing the United States District Court for the District of Minnesota's entry of summary judgment for Petitioner. The following questions would be raised:

1. Does an accurate, but incomplete communication from a government official justify equitable tolling of the charge-filing deadline of the Age Discrimination in Employment Act ("ADEA"), when the defendant employer has committed no misconduct and has complied with the ADEA's notice provisions?

2. Does an incomplete communication from a State of Minnesota official justify equitable tolling of the charge-filing deadline of the federal ADEA statute, when the defendant employer has complied with the ADEA's provisions for notifying a charging party of his or her ADEA rights?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below are those listed in the caption on the cover of this petition.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1363

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Plaintiffs - Appellants,

v.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Defendant - Appellee.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States District Court for the District of Minnesota granting Unisys Corporation's ("Unisys") motion to dismiss was issued on October 20, 1993. It is unreported and reprinted in the Appendix ("A") at A-47-60. The District Court's Opinion granting Unisys' motion for reconsideration was issued on December 28, 1993. It is unreported and reprinted in the A-23-46.

Plaintiffs-Appellants appealed to the Eighth Circuit Court of Appeals. A panel of the Court of Appeals issued a decision affirming the District Court's October 20, 1993 Order, but reversing the December 28, 1993 Order. The decision was issued on February 14, 1995, is reported at 47 F.3d 302 and reprinted at A-5-22. On April 19, 1995, the panel denied Plaintiffs-Appellants' motion for rehearing. The April 19, 1995 Order is unreported and reprinted at A-1-4.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1), which provides for review "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Under 28 U.S.C. § 2101(c), the writ must be "taken or applied for within ninety days after the entry of the judgment or decree." *See* Sup. Ct. R. 13.1. The 90 day period commences from the date of a denial of a petition for rehearing. In this case, Plaintiffs-Appellants' petition for rehearing was denied on April 19, 1995. The 90 day period would expire on July 19, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Article VI, section 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 633(b):

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant and seek relief from such

discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Minn. Stat. § 363.03 subd. 1:

Except when based on a bona fide occupational qualification, it is an unfair employment practice . . . For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

STATEMENT OF THE CASE

This Petition seeks review of the Eighth Circuit Court of Appeals' decision that accurate, but incomplete, statements from an official at the Minnesota Department of Human Rights ("MDHR") suffice to equitably toll the federal ADEA's charge-filing deadline. The Eighth Circuit's decision alters the 300-day charge filing deadline of the ADEA based on a statement in an MDHR form letter sent to potential charging parties that the charge-filing period of Minnesota's state anti-discrimination statute was 365 days. The Eighth Circuit held that since the letter did not also include information regarding the ADEA charge-filing deadline, thus "mislead[ing]" a potential charging party, the federal deadline must be extended to match the state deadline. The Eighth Circuit's decision is in direct conflict with decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals, all of whom have held that accurate, but incomplete, statements from a government official are not sufficient to equitably toll the ADEA's charge-filing deadline. Moreover, the Eighth Circuit's decision threatens the integrity of the statute of limitation of the ADEA in particular and federal statutes of limitations in general; any state official may alter a federal statute simply by stating that the federal statute is longer than the period chosen by Congress. Finally, this decision is of substantial practical importance. The Eighth Circuit has effectively altered the ADEA charge-filing deadline for all potential charging parties who received the form letter from the MDHR. This Court should review this decision so as to resolve the conflict in this area and protect the federal ADEA's charge-filing deadline.

I. BACKGROUND

This case arises from two sets of layoffs at Unisys' facility in Eagan, Minnesota in 1990. On April 2, 1990, Plaintiffs-Appellants Anderson, Eggan, Englehorn, Lowry, Nielsen and Wandersee were informed that they were to be laid off. A second layoff occurred approximately two and one-half months later. On June 18, 1990, Plaintiff-Appellant Woods was informed that he would be laid off.[1]

Plaintiffs-Appellants Eggan, Englehorn, Lowry, Woods and Wandersee all sought legal advice after their layoffs. Before they filed charges with the MDHR and the EEOC, they engaged Maurice O'Brien a plaintiff-side employment law specialist at Gordon, Miller & O'Brien. Attorney O'Brien advised Plaintiffs-Appellants in the charge-filing process.

More than 300 days passed before any Plaintiff-Appellant filed a charge of discrimination. Plaintiff-Appellant Anderson filed a charge of age-based discrimination on March 25, 1991, over 360 days after receiving his notice of layoff. Plaintiffs-Appellants Eggan, Englehorn, Lowry, and Wandersee filed charges, by and through legal counsel, on April 1, 1991, one year after receiving notice of their layoff. Plaintiff-Appellant Woods separately filed a charge, by and through legal counsel, on June 4, 1991, well over 300 days after he was notified of his

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[1] Numerous other layoffs have occurred in software engineering, most recently in 1994.

layoff. Plaintiff-Appellant Nielsen never filed a charge with either the EEOC or the MDHR.

Ruling separately in each case on requests to reconsider, the MDHR affirmed or reaffirmed its finding that there was no probable cause to support the claims. Plaintiffs-Appellants Eggan, Englehorn, Lowry, Woods and their counsel were notified in separate letters dated December 24, 1991 that no further action would be taken on the claims and that they had 45 days to begin litigation in accordance with Minnesota statutes. Plaintiff-Appellant Wandersee and his counsel received a similar notification on December 27, 1991. Plaintiff-Appellant Anderson was notified that no further action would be taken on his claim on December 26, 1991.

Plaintiffs-Appellants Anderson, Lowry, Eggan, Wandersee, Englehorn and Woods then met with Attorney O'Brien to discuss their options. Attorney O'Brien informed them that they could file a lawsuit in court, and explained that they had a forty-five day time limit for filing. Attorney O'Brien was willing to proceed to state or federal court, but Plaintiffs-Appellants Lowry, Eggan, Wandersee, Englehorn and Woods elected not to do so.

On February 10, 1992, Plaintiff-Appellant Anderson filed, but did not serve, a complaint in Federal Court alleging state and federal discrimination claims. No claims on behalf of other employees were asserted in that complaint, which was not designated as a "class" complaint. On June 9, 1992 -- 119 days after this filing -- an amended complaint was served in which Plaintiff-Appellant Anderson first purported to represent a class of similarly situated employees. On March 25, 1993, the Court denied Plaintiff-Appellant

Anderson's motion for class certification, but allowed members of the putative class to join the action. A-25. Six such "putative plaintiffs" elected to do so.

II. DISTRICT COURT'S DECISIONS

A. Motion to Dismiss.

On October 20, 1993, the District Court held that the claims of Plaintiffs-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods, and the state law claims of Anderson and Nielsen, were untimely. The Court first held that Eggan, Englehorn, Lowry, Wandersee and Woods "received [ADEA] right to sue letters and deliberately decided not to file lawsuits after receiving legal advice." A-56. The Court explained that it could "only conclude that [Plaintiffs-Appellants] made a deliberate and counseled decision not to proceed and to allow the statute of limitations to run." A-57. As a result, it dismissed their claims.

The Court then addressed Anderson and Nielsen's state law claims. The Court noted that although Anderson filed his Complaint in timely fashion, he did not serve that Complaint upon Unisys until after the statute of limitations had expired on his state law claims. A-57. The Court acknowledged that state law governs for purposes of determining how and when an action must be commenced, and noted that the Minnesota Rules of Civil Procedure explicitly state that service, not filing, commences an action. A-57-58. The Court therefore held that the state law claims of Anderson and Nielsen were barred by the applicable statute of limitations. A-58.

B. Motion for Summary Judgment.

Unisys first moved for summary judgment on Anderson and Nielsen's ADEA claims based on evidence that an ADEA notice was posted in the human resources area of the building next to that used by Anderson and Nielsen. The Court denied this motion for summary judgment, but the Court's questions at oral argument led Unisys to interview its security guards, and discover additional evidence that a posting was also present in the lobby of the building used by Andersen and Nielsen. Unisys moved the Court to reconsider its denial of summary judgment based on this evidence, after plaintiffs were given an opportunity to thoroughly cross-examine the guards.

The Court granted Unisys' motion on December 28, 1993. The Court first rejected Appellants' request that it ignore the new evidence, holding that both parties had acted in good faith during the discovery process, and that Plaintiff-Appellants had the opportunity to depose the new witnesses and probe into the sources of the witnesses' knowledge, thus eliminating any prejudice which might result from consideration of the evidence. A-43-44. As a result, the Court examined the evidence and concluded that "it is clear that plaintiffs will not be able to prove that defendant failed to comply with statutory notice requirements." A-44. The Court therefore granted Unisys' motion. A-46.

III. COURT OF APPEALS' OPINION

The Eighth Circuit Court of Appeals affirmed the District Court's October 20, 1993 Order dismissing Plaintiff-Appellants' state law claims and the ADEA claims of

Plaintiff-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods. The Court of Appeals also, however, reversed the December 28, 1995 ruling and held that the ADEA claims of Plaintiff-Appellants Andersen and Nielsen were not barred by their failure to file timely charges of discrimination.

The Court of Appeals first reversed the District Court's December 28, 1993 Order and held that the ADEA claims of Plaintiff-Appellants Andersen and Nielsen were not barred by their failure to file timely charges of discrimination. The Court of Appeals based its decision on a form letter sent to Plaintiff-Appellant Andersen by the MDHR:

> Anderson first contacted the MDHR about the possibility of filing an administrative charge in the fall of 1990. The first letter he received from the MDHR stated that he had one year from the date of the discriminatory action to file an administrative discrimination charge with the MDHR and that if the "charge alleges a violation of the federal laws . . . the Department will also file it with the (EEOC) . . . " The form made no mention of the fact that the administrative filing deadline with the EEOC was 300 days rather than one year. Anderson claims this letter led him to believe that the federal and state deadlines were the same, one year from the date of the discriminatory action.

A-12 (ellipses and parentheses in original). The Court of Appeals noted that the MDHR's form letter was accurate and contained no misrepresentations, A-15, but nevertheless held

that the letter justified equitable tolling of the ADEA's charge-filing deadline. A-16. The Court rejected Unisys's contention that accurate, but incomplete, communications from a government official were insufficient to toll the ADEA's charge-filing deadline:

> Unisys urges that Anderson cannot rely on the letter from the MDHR as a basis for equitably tolling the administrative filing period because the letter does not contain any misinformation or misrepresentations, but merely fails to include all relevant information. We disagree. In *Warren* [*v. Department of the Army*, 867 F.2d 1156, 1160-61 (8th Cir. 1989)], a federal employee brought suit against the wrong defendant because a letter from the EEOC did not make clear the correct party to be sued. As in this case, the letter did not make any affirmative misrepresentations, but rather used ambiguous and misleading language. We are convinced that the letter Anderson received from the MDHR, like the letter Warren received from the EEOC, would easily mislead a claimant unassisted by counsel.

A-15. The Court then held, as a matter of law, that "we find the letter sufficient to equitably toll the federal limitations period in this case." A-16.

The Court of Appeals then held that the District Court properly dismissed the federal claims of Plaintiff-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods, because these individuals had made an affirmative decision, while

advised by counsel, not to bring a lawsuit against Unisys. A-19-20. The Court reasoned:

> Those plaintiffs who do file administrative charges, however, should be bound by the statute of limitations, which is normally stated in the right-to-sue letter. Even if those plaintiffs are piggybacking on another employee's timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters. Thus, any claimant who files an administrative charge and receives a right-to-sue letter from the EEOC must file suit within ninety days after receiving that letter to preserve the cause of action.

A-20. The Court also affirmed the dismissal of the state law claims of Plaintiffs-Appellants Andersen and Nielsen because they failed to commence those claims until after the state statutes of limitations had run. A-21.

The Court therefore affirmed the dismissal of the claims of Plaintiffs-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods, as well as the dismissal of the state law claims of Plaintiffs-Appellants Anderson and Nielsen, reversed the entry of summary judgment on the ADEA claims of Plaintiffs-Appellants Anderson and Nielsen, and remanded the case to the District Court with the instruction to "equitably toll the federal administrative filing period as [Plaintiff-Appellants Anderson and Nielson]." A-21

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS AS TO WHETHER AN ACCURATE BUT INCOMPLETE COMMUNICATION FROM A GOVERNMENT OFFICIAL MAY EQUITABLY TOLL THE ADEA CHARGE-FILING DEADLINE.

Five United States Courts of Appeals have addressed the issue of whether and under what circumstances a communication from a government official may justify an equitable tolling of the ADEA's charge-filing deadline. With the exception of the Eighth Circuit Court of Appeals, the Circuit Courts have unanimously held that an accurate, but incomplete, communication from a government official did not justify such equitable tolling. The Eighth Circuit has created a conflict which this Court should resolve.

The Eighth Circuit Court of Appeals unambiguously held in the instant case that an accurate, but incomplete, communication from a government official may justify equitable tolling of the ADEA's charge filing deadline. A-14-16. The Court explained its holding as follows:

> In *Warren* [*v. Department of the Army*, 867 F.2d 1156, 1160-61 (8th Cir. 1989)], a federal employee brought suit against the wrong defendant because a letter from the EEOC did not make clear the correct party to be sued. As in this case, the letter did not make any affirmative misrepresentations, but rather used ambiguous and misleading language. We are

> convinced that the letter Anderson received from the MDHR, like the letter Warren received from the EEOC, would easily mislead a claimant unassisted by counsel.

A-15. The Court therefore held that the letter equitably tolled the ADEA's charge filing deadline. A-16. This holding (and the Eighth Circuit's previous holding in *Warren*) are in direct conflict with the decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals.

The Second Circuit Court of Appeals has held that accurate but incomplete or ambiguous statements from a government official do not justify equitable tolling. *See Vernon v. Cassadaga Valley Central School District*, 1995 U.S. App. LEXIS 4714 *14-15 (2nd Cir.); *Long v. Frank*, 22 F.3d 54, 58-59 (2nd Cir. 1994). In *Vernon*, the Second Circuit rejected the plaintiffs' equitable tolling argument because although an EEOC right to sue letter sent to the plaintiffs was "not a model of clarity," it "was clearer than that sent in *Long*, was correct in its content, and surely did not amount to affirmative misconduct." 1995 U.S. App. LEXIS at * 15. This conclusion is consistent with the Second Circuit's previous decision to reject equitable tolling in *Long* because "[t]he ambiguity of the EEOC notice does not, however, amount to affirmative misconduct" necessary to equitably toll the ADEA's charge-filing deadline. 22 F.3d at 59.

The Third Circuit Court of Appeals has also addressed accurate but incomplete or ambiguous statements from a government official, and has held that such statements do not justify equitable tolling. *See Williams v. Army and Air Force*

Exchange Service, 830 F.2d 27, 30-31 (3rd Cir. 1987); *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 754 (3rd Cir.), *cert. denied*, 464 U.S. 852 (1983). In *Williams*, the Third Circuit held that a government official's provision of incomplete information is insufficient to justify tolling:

> Williams argues that the government officials actively mislead her attorney concerning the proper defendant. According to the affidavit of her counsel, AAFES personnel told counsel that AAFES was an unincorporated, nonappropriated funds activity and that service should be made on the U.S. Attorney General and the local U.S. Attorney . . . Although these statements to plaintiff's counsel may have led him to believe that naming AAFES as the defendant would have been proper, they were correct and the government engaged in no misrepresentation.

830 F.2d at 31. This conclusion is consistent with the Third Circuit's prior conclusion in *Kocian* that the EEOC's provision of accurate, but incomplete, information is insufficient to justify tolling. 707 F.2d at 755.

The Tenth and Fifth Circuit Courts of Appeals have concurred with the Second and Third Circuits' rejection of equitable tolling based upon accurate, but incomplete, statements of government officials. *See Mascheroni v. Board of Regents of the University of California*, 28 F.3d 1554, 1562-63 (10th Cir. 1994); *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992). In *Mascheroni*, the Tenth

Circuit Court of Appeals rejected a Title VII equitable tolling claim, stating that:

> We have explained that the time limits in Title VII "will be tolled *only* if there has been 'active deception' of the claimant regarding procedural prerequisites." *Sheerer v. Rose State College*, 950 F.2d 661, 665 (10th Cir. 1991), *cert. denied*, --- U.S. ---, 112 S. Ct. 2995, 120 L.Ed.2d 872 (1992) . . .

28 F.3d at 1562 (emphasis in original) (citation omitted). The Tenth Circuit concluded that the plaintiff failed to demonstrate the requisite active deception necessary to establish equitable tolling. The Fifth Circuit Court of Appeals reached a similar conclusion in *Conaway*:

> [Conaway] argues, however, that he was misled when, according to him, the EEOC failed to tell him that he had to file the complaint with the EEOC within 300 days of the discrimination; if he had been told this, he would have filed a complaint that month. He contends, therefore, that because the EEOC misled him, the time limitation should be equitably tolled. This Circuit has not addressed the issue of whether an accurate, but incomplete, oral statement by the EEOC can be the basis for equitable tolling . . . we hold that the alleged incomplete oral statements made by the EEOC to Conaway during a telephone conversation will not support equitable tolling.

955 F.2d at 363. The Fifth Circuit thus refused to equitably toll the charge-filing deadline.

All of these decisions are directly contrary to the Eighth Circuit Court of Appeals' decisions in *Warren* and the instant case. The Eighth Circuit Court of Appeals concluded in *Warren* that a government official's accurate but incomplete or ambiguous statements were sufficient to establish equitable tolling. Since the Eighth Circuit's decision in *Warren*, the Second, Fifth and Tenth Circuit Court of Appeals all held that such statements are not sufficient to toll the charge-filing deadline (the Third Circuit Court of Appeals had already reached that conclusion). The Eighth Circuit nevertheless has refused to alter its position and maintains that such statements may toll the charge-filing deadline. This Court should grant Certiorari to resolve this conflict.

The conflict between these positions is particularly important because it will impact upon a tremendous number of lawsuits. The Eighth Circuit Court of Appeals held, as a matter of law, that an MDHR form letter which contained only the Minnesota charge-filing deadline, but not the federal deadline, was sufficiently "ambiguous" and "misleading" so as to justify equitable tolling of the ADEA's charge-filing deadline. The MDHR sent out thousands of such letters to potential charging parties, all of whom now have (under the Eighth Circuit's analysis) a 365 day charge-filing deadline

under the ADEA.[2] Moreover, the MDHR (and many other federal and state agencies in Minnesota and elsewhere) send numerous other communications, both written and verbal, to charging parties. All of these communications, under the Eighth Circuit's reasoning, must be "unambiguous" and "complete" or the ADEA's charge-filing deadline will be equitably tolled. This decision will thus have a substantial impact upon a large number of employers and employees, as well as upon a variety of federal, state and local agencies.

In fact, the Eighth Circuit Court of Appeals' holding should apply with equal force outside of the ADEA context. Employment statutes with similar statute of limitations schemes, such as Title VII of the Civil Rights Act of 1964, and other federal statutes which have analogous state statutes, may now be altered by any communication from a state or federal official that is arguably "ambiguous" or "incomplete." This conclusion threatens the integrity of all such statutes of limitations and impacts upon a wide swathe of plaintiffs and defendants as well as federal, state and local officials.

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[2] This aspect of the Court's ruling is particularly significant because the Court did not cite, and Plaintiffs-Appellants did not provide, any evidence that Plaintiffs-Appellants actually relied upon the Minnesota Department of Human Rights' letter. *See* A-12. In effect, the Court held as a matter of law that all recipients of the letter may establish equitable tolling regardless of whether they actually relied upon the statements contained therein in not filing a charge of discrimination.

II. THIS COURT SHOULD SETTLE THE ISSUE OF WHETHER A REPRESENTATION OF A STATE OFFICIAL CAN TOLL THE FEDERAL ADEA CHARGE-FILING DEADLINE DESPITE THE EMPLOYER'S COMPLIANCE WITH FEDERALLY IMPOSED NOTICE PROVISIONS.

The Eighth Circuit Court of Appeals specifically held that a representation of a state official may justify tolling of a federally imposed statute of limitations, even though the defendant-employer, Unisys, had complied with the ADEA's notice-posting requirements. The Eighth Circuit's decision effectively allows a state official to alter the statute of limitations of a federal statute by sending out a form letter to potential charging parties. This decision threatens the integrity of federal statutes of limitations, which may now be changed by a state official who makes an incomplete, ambiguous or inaccurate statement regarding the federal statute of limitations.

The Eighth Circuit even acknowledged this difficulty in noting that "most of the cases cited involve misleading correspondence or information from the EEOC, and the letter in this case came from the MDHR . . ." A-14. The Court concluded, however, that "we do not find that a meaningful distinction," A-14, because the EEOC and MDHR have a "worksharing agreement" that provides that the EEOC and MDHR "each designate the other as its agent for the purpose of receiving and drafting charges." A-14.

The Eighth Circuit has allowed the MDHR, a state agency, to alter a statute of limitations adopted by the United States Congress to match Minnesota's state statute of

limitations by sending a form letter to prospective charging parties. This Court has specifically warned against allowing states to alter the statutes of limitations specified by Congress in the ADEA:

> The ADEA's limitations periods are set forth in explicit terms in 29 U.S.C. § 626(d) and (e), not § 14(b) . . . We will not attribute to Congress an intent through Section 14(b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state age discrimination statutes of limitations. *Cf. Occidental Life Ins. Co v. EEOC*, 432 U.S. 355, 371, 53 L. Ed.2d 402, 97 S. Ct. 2447 (1977). Congress could not have intended to consign federal lawsuits to the "vagaries of diverse state limitations statutes," *ibid.*, particularly since, in many States, including Iowa, the limitations periods are considerably shorter than the 180-day period allowed grievants in nondeferral States by 29 U.S.C. § 626(d)(1).

Oscar Mayer & Co. v. Evans, 441 U.S. 750, 762-63, 99 S. Ct. 2066, 60 L. Ed.2d 609, 619-20 (1979) (footnotes omitted). This Court and Congress have both sought to protect the ADEA's statute of limitations from state interference. *Id.*; *Occidental Life Ins*, 432 U.S. at 371. The Eighth Circuit Court of Appeals' decision allows precisely the type of interference previously prohibited by Congress and this Court.

The Eighth Circuit's decision creates a particularly destructive type of interference. The Eighth Circuit allows the ADEA's statute of limitations to be altered not by the legislature of the State of Minnesota, but by the MDHR. Congress and this Court have prohibited a state legislature from altering the ADEA's statute of limitations. *Oscar Mayer*, 441 U.S. at 762-63. An official at a Minnesota agency should not be permitted to do what the state legislature does not have the power to accomplish.

This interference is also problematic because a defendant-employer, such as Unisys, may comply with all applicable federal requirements in notifying its employees of their rights under the ADEA, only to see a state official later alter the ADEA's statute of limitations. In this case Unisys complied with all such requirements, but is nevertheless subject to an extended statute of limitations as a result of a state official's communication with a prospective charging party.

Contrary to the contention of the Eighth Circuit Court of Appeals in this case, the worksharing agreement between the EEOC and the MDHR does not alleviate these problems. The EEOC cannot itself alter the ADEA's statute of limitations, and certainly cannot delegate "authority" to to make such alterations to a state agency such as the MDHR. Moreover, the fact that the EEOC and the MDHR have negotiated a worksharing agreement does not prevent the ADEA and other federal civil rights statutes from being subject to the "vagaries of diverse state limitations statutes" previously condemned by this Court in *Oscar Mayer* and *Occidental Life*. Finally, the worksharing agreement will not lessen or limit the impact of this decision; such worksharing

agreements have been negotiated by the EEOC and a state agency in nearly every state. This decision may therefore have an impact in a wide variety of different states.

The Eighth Circuit Court of Appeals' decision allows a state official to alter a federal statute of limitations by sending a form letter to prospective plaintiffs. This decision allows the sort of state interference with federal statutes of limitations that Congress sought to avoid, and that this Court condemned in *Oscar Mayer* and *Occidental Life*. The decision poses grave dangers to the integrity of the statute of limitations of the ADEA in particular and federal civil rights statutes in general.

CONCLUSION

The theoretical implications and the practical impact of the Eighth Circuit Court of Appeals' decision both warrant review by this Court. The Eighth Circuit's decision is in direct conflict with decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals, all of whom have held that accurate, but incomplete statements from a government official are not sufficient to equitably toll the ADEA's charge-filing deadline. The practical impact of the Eighth Circuit's decision will be instant and severe. The decision effectively alters the charge-filing deadline under the ADEA for all potential charging parties who received this form letter, or any similar letter, from the MDHR or any similar state or federal agency. The same reasoning should apply to all other federal statutes that have a state counterpart. This decision will impact upon a large number of employees, employers, plaintiffs, defendants and federal, state and local officials and agencies. The theoretical implications of the

Eighth Circuit's decision are even more significant: the decision allows a state official to alter a federal statute of limitations by merely sending a form letter to potential plaintiffs.

Accordingly, Unisys respectfully requests the Supreme Court issue a Writ of Certiorari to review the critical statutory and Constitutional issues raised by this case. Ultimately, Unisys seeks reversal of the Eighth Circuit Court of Appeals with an order dismissing the ADEA claims of Plaintiff-Appellants Anderson and Nielsen on the grounds that they did not file those claims within the charge-filing deadline prescribed by the ADEA.

Respectfully submitted this 18th day of July, 1995.

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UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 94-1363

Richard Anderson, Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods, Peter Lowry,	)	
Plaintiffs - Appellants,	)	
v.	)	Order Denying Petition for Rehearing
Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,	)	
Defendants - Appellee.	)	

Filed: April 19, 1995

Before McMILLIAN, Circuit Judge, LAY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

Appellants have petitioned for a rehearing of that portion of this Court's opinion filed February 14, 1995, that affirmed the dismissal of Appellants Robert Eggan, Carl Englehorn, Timothy Wandersee, Donald Woods, and Peter Lowry from this action. Specifically, Appellants claim this Court erred in finding they waived their argument that the statute of limitations contained in the Civil Rights Act of 1991, which became effective November 21, 1991, did not apply to this case. Appellants also claim this Court erred in finding the first complaint filed in this action was never served upon Unisys.

Unisys's Memorandum in Support of its Motion to Dismiss, filed with the district court on July 28, 1993, is replete with references to the 90-day limitations period from the Civil Rights Act of 1991. Nevertheless, Appellants' Memorandum in Opposition to that motion, filed August 16, 1993, never indicated that any other limitations period should apply. On that basis, the district court found that "[t]he parties agree that the Civil Rights Act of 1991 applies to this case." Anderson v. Unisys, No. CV 4-92-138, slip op. at 6 n.2 (October 20, 1993). Appellants' petition for rehearing points out that they raised the issue and argued the Civil Rights Act of 1991 did not apply in their Motion for Reconsideration of the order granting the Motion to Dismiss, filed with the district court on November 3, 1993. The district court summarily denied that motion on November 24, 1993, without ruling on the issues raised therein.[1] Thus,

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[1] Appellants urge that the district court's order denying the motion for reconsideration considered the merits of that motion. We must disagree. The court let stand its original

order reflecting that the parties had agreed that the Civil Rights Act of 1991 was applicable.

Moreover, even on its merits, Appellants' argument that the Civil Rights Act of 1991 is inapplicable would fail. The Act became effective on November 21, 1991, and this action was not filed until well after that date. Thus, it is difficult to find the application of the new provisions to this case "retroactive." District courts that have considered this issue have found that the new statute of limitations applies to claims accrued, but not filed, before the date the statute was enacted. See, e.g., Smith v. Zeneca, Inc., 820 F. Supp. 831, 832-34 (D. Del. 1993) (holding new statute of limitations applies to action filed after effective date of Act), aff'd mem., 37 F.3d 1489 (3d Cir. 1994); Jones v. Frank, 819 F. Supp. 923, 925 (D. Colo. 1993) (applying old statute of limitations because action filed before enactment date), aff'd on other grounds, 32 F.3d 1454 (10th Cir. 1994); McConnell v. Thompson Newspapers, Inc., 802 F. Supp. 1484, 1495-96 (E.D. Tex. 1992) (applying new statute of limitations to cause of action filed after date Act effective). In addition, even if the application of the new provisions to this case may be considered retroactive, this Court has previously held that the ADEA statute of limitations is "intended to serve as a conventional limitation on the remedy, not upon the right to bring the action." Mumbower v. Callicott, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975). Thus, we consider the limitations period a procedural rather than a substantive requirement, and have found that "courts apply the procedure in effect when the case is before them." United States v. Higgins, 987 F.2d 543, 546 (8th Cir. 1993).

because the district court never passed upon this issue, we decline to consider it here. See Daisy Mfg. Co. v. N.C.R. Corp., 29 F.3d 389, 395 (8th Cir. 1994) ("Ordinarily, we do not decide issues that the district court did not adjudicate."); North Dakota v. Merchants Nat'l Bank & Trust Co., 579 F.2d 1112, 1115 (8th Cir. 1978) ("Generally we do not decide issues that were not passed upon by the trial court."); Highlands Ins. Co. v. Lewis Rail Serv. Co., 10 F.3d 1247, 1250-51 (7th Cir. 1993) (finding appellant had waived argument by failing to raise it until its motion for reconsideration of district court's entry of summary judgment); Burnette v. Dresser Indus., Inc., 849 F.2d 1277, 1285 (10th Cir. 1988) (declining to consider on appeal argument raised in a motion for reconsideration but "not considered or ruled upon by the district court").

Appellants also claim this Court erred in finding the first complaint filed in this action was never served upon Unisys. Two of the district court's orders specifically state that the first complaint was never served on Unisys. See Anderson v. Unisys, No. CV 4-92-138, slip op. at 2 (December 30, 1993) ("That original complaint was never served upon defendant."). Anderson v. Unisys, No. CV 4-92-138, slip op. at 3 (October 20, 1993) (same). Appellants never brought this alleged error to the attention of the district court, nor did they argue to this Court that this factual finding of the district court was in error. In any event, even if the first complaint was served on Unisys, that fact would not change the analysis in our original opinion.

For the foregoing reasons, the petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1363

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,	*	
Plaintiffs - Appellants,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota
Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,	*	
Defendant - Appellee.	*	

Submitted: October 13, 1994

Filed: February 14, 1995

Before McMILLIAN, Circuit Judge, LAY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

LAY, Senior Circuit Judge.

Richard Anderson commenced this action against Unisys Corporation ("Unisys") for age discrimination under the Age Discrimination in Employment Act ("ADEA") and state anti-discrimination statutes. Several other former Unisys employees later joined the suit. The district court dismissed the state and federal claims of all the plaintiffs, except Anderson and Nielsen, for failure to comply with the statute of limitations. It then dismissed Anderson and Nielsen's state claims. Finally, it granted Unisys's motion for summary judgment on the federal claims of Anderson and Nielsen, finding they had failed to timely file an administrative charge and that there was no basis on which to equitably toll the filing deadline. We reverse in part, affirm in part, and remand for further proceedings.

BACKGROUND

Unisys laid off Anderson[1] and several other employees in the company's Software Engineering Division on April 2,

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[1] Unisys has rehired Anderson, but he nevertheless continues to pursue this action.

1990.[2] Anderson, who was forty-nine years old when he was laid off, filed administrative age discrimination charges with the Minnesota Department of Human Rights ("MDHR") and the Equal Employment Opportunity Commission ("EEOC") on March 25, 1991.[3] Nielsen never filed a charge with the MDHR or the EEOC. The other discharged employees

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[2] The other employees who eventually filed suit were Robert Eggan, Carl Englehorn, Peter Lowry, Norris Nielsen, Timothy Wandersee, and Donald Woods. Unisys notified all the plaintiffs that they were terminated on April 2, 1990, with the exception of Woods, who was informed of his termination on June 18, 1990.

[3] To bring an age discrimination suit under either the ADEA or Minnesota state law, plaintiffs are required to file administrative charges of age discrimination within certain time limits. The MDHR's administrative filing deadline is one year from the date of the allegedly discriminatory action. Minn. Stat. § 363.06 (1994). Minnesota is a deferral state under the ADEA; therefore, age discrimination claims filed with the MDHR are deemed to have been filed with the EEOC at the same time. 29 U.S.C. § 633(b) (1988). The EEOC's administrative filing deadline is 300 days, however, rather than one year. 29 U.S.C. § 626(d) (2) (1988). Anderson was terminated on April 2, 1990 and filed his administrative charge with the MDHR on March 25, 1991. Thus, he satisfied the one-year state administrative filing deadline, but missed the 300-day federal deadline.

retained counsel and also eventually filed charges with the MDHR.[4]

Anderson filed a pro se complaint in federal district court on February 10, 1992.[5] This complaint was never

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[4] The district court found that Eggan, Englehorn, Lowry, Wandersee, and Woods all filed administrative charges with the MDHR on April 1, 1991. See Anderson v. Unisys, No. CV 4-92-138, slip op. at 4 (October 20, 1993). On that basis, the court found that all these plaintiffs had missed the 300-day EEOC filing deadline except Woods, because Woods was notified of his termination on June 18, 1990. Woods's administrative charge is included in the record, however, and is dated May 29, 1991. Thus, it appears that, like Anderson, all of these plaintiffs, including Woods, met the one year state administrative filing deadline, but missed the 300-day federal deadline.

[5] Once the administrative process is complete, both the MDHR and the EEOC issue right-to-sue letters to potential plaintiffs; to preserve their claims, those individuals must then bring suit within a certain number of days after receiving the right-to-sue letters. The state statute of limitations for age discrimination claims is 45 days after receipt of a right-to-sue letter from the MDHR. Minn. Stat. § 363.14 (1994). The federal statute of limitations for ADEA claims is 90 days after the charging party receives a right-to-sue letter from the EEOC. 29 U.S.C. § 626(e) (Supp. 1993). Although the record is somewhat confusing, the parties appear to agree that Anderson filed his federal claim within 90 days after receipt of his right-to-sue letter from the EEOC and satisfied the

served on Unisys. All other plaintiffs, with the exception of Nielsen, consulted an attorney and decided not to pursue an action against Unisys, allowing the statute of limitations to run on their federal and state claims.

On June 9, 1992, with the assistance of counsel, Anderson filed an amended complaint that was served on Unisys. In his second complaint, he alleged that the other employees also had been terminated in violation of the ADEA and state law. He sought certification as a class action under 29 U.S.C. § 216(b) (1988).[6]

On March 25, 1993, the district court ruled that class certification was not warranted, but stated it would permit the other plaintiffs to join as individual parties.[7] The court also addressed Unisys's argument that Anderson's ADEA action was barred for failure to file a timely administrative charge with the EEOC. Anderson claimed that the administrative filing period should be equitably tolled because he had been

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federal statute of limitations.

[6] Certification of ADEA class actions is governed by 29 U.S.C. § 216(b) rather than Fed. R. Civ. P. 23.

[7] Apparently the district court, at that time, was unaware that all of the claimants except Nielsen had received right-to-sue letters following the rejection of their individual administrative filings, and failed to file timely suits. The record before us does not include Anderson's amended complaints which added these plaintiffs, but the briefs indicate those complaints were filed in June and July of 1993.

misled by Unisys and the MDHR, or in the alternative, because Unisys had failed to post a notice of employees' rights under the ADEA in an accessible location as required by law.[8]

In August 1993, Unisys filed a motion to dismiss all plaintiffs, except Anderson and Nielsen, because they had received right-to-sue letters from the EEOC and MDHR, but failed to file suit within the federal and state statutes of limitations after consulting an attorney and making a deliberate decision not to sue. The court granted the motion and dismissed their claims. The court also dismissed the state claims of Anderson and Nielsen for failure to commence suit within the time allowed under the state statutes of limitations.

These rulings left only Anderson and Nielsen's federal claims viable. The district court initially denied Unisys's motion for summary judgment on those claims, finding a genuine issue of material fact as to whether the administrative filing period should be equitably tolled because Unisys had failed to adequately post notice of employee rights under the

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[8] Although all the plaintiffs failed to file timely administrative charges with the EEOC, the district court found that the plaintiffs seeking to join Anderson's suit could "piggyback" on Anderson's administrative filing, provided he could show he was entitled to equitably toll the administrative filing period. See Kloos v. Carter-Day Co., 799 F.2d 397 (8th Cir. 1986); Allen v. Amalgamated Transit Union, 554 F.2d 876, 882-83 (8th Cir.), cert. denied, 434 U.S. 891 (1977). This proposition is not challenged here.

ADEA. On December 1, 1993, however, Unisys asked the court to reconsider its denial of summary judgment based on newly discovered evidence that it had posted notice of employees' rights under the ADEA in the very building where Anderson worked.[9] In late December 1993, the court granted Unisys's motion for reconsideration based on that evidence and entered summary judgment in its favor. Anderson and his fellow plaintiffs appeal the dismissal of the federal claims of all plaintiffs except Anderson and Nielsen, the dismissal of all state claims, and the adverse entry of summary judgment on the remaining federal claims.

TIMELINESS OF ANDERSON'S ADEA CLAIM

It is undisputed that Anderson failed to file a charge with the EEOC 300 days after April 2, 1990, the date he was notified of his discharge. The administrative deadline is not a jurisdictional limitation, however, but operates in the nature of a statute of limitations and is subject to equitable tolling and estoppel. See Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) (holding that administrative filing period under Title VII is subject to waiver, estoppel, and equitable tolling); Heideman v. P.F.L., Inc., 904 F.2d 1262, 1265 (8th Cir. 1990) (holding administrative filing period under ADEA subject to equitable tolling), cert. denied, 498 U.S. 1026 (1991); DeBrunner v. Midway Equip. Co., 803 F.2d 950, 952 (8th Cir. 1986) (finding ADEA filing requirement subject to

[9] This evidence consisted of the affidavits of four security guards who worked at Unisys and claimed that the notices were conspicuously posted in the building where Anderson worked.

equitable tolling). Anderson offers several alternative arguments for tolling the 300-day EEOC administrative filing period. Because we find his claim that the letter he received from the MDHR was misleading sufficient to justify equitably tolling the filing period, we need not address the remainder of his arguments.

Anderson first contacted the MDHR about the possibility of filing an administrative charge in the fall of 1990. The first letter he received from the MDHR stated that he had one year from the date of the discriminatory action to file an administrative discrimination charge with the MDHR and that if the "charge alleges a violation of the federal laws . . .the Department will also file it with the [EEOC] . . . ." The form made no mention of the fact that the administrative filing deadline with the EEOC was 300 days rather than one year. Anderson claims this letter led him to believe that the federal and state deadlines were the same, one year from the date of the discriminatory action.

The district court found that representations made by the MDHR are insufficient as a matter of law to equitably toll the administrative filing period because this Court has previously held that "[e]quitable tolling arises upon some positive misconduct by the party against whom it is asserted."[10] Heideman, 904 F.2d at 1266 (quoting DeBrunner,

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[10] Based on this language in previous opinions in this circuit, the district court found that "equitable tolling is only appropriate if the failure to file a timely charge is attributable to conduct of the defendant." Anderson v. Unisys, No. CV 4-92-138, slip op. at 9 (March 25, 1993).

803 F.2d at 952) (emphasis added); Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 359 (8th Cir.), cert. denied, 469 U.S. 1036 (1984); see also Miller v. Runyon, 32 F.3d 386, 390 (8th Cir. 1994) (implying that only employer misconduct justifies equitable tolling). We feel the district court's reliance on this language, although understandable, fails to read this statement in the limited context of the facts presented. In each of the cases using that language, the plaintiff claimed the employer had failed to post information about employees' rights under civil rights statutes. Equitable tolling is permissible in other situations as well. In Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984), the Supreme Court outlined several circumstances that may justify equitable tolling of a limitations period. These include cases:

> in which a claimant has received inadequate notice . . . ; or where a motion for appointment of counsel is pending . . . ; or where the court has led the plaintiff to believe that she had done everything required of her . . . . [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

Id. (citations omitted).

It is clear that equitable tolling is premised on the plaintiff's excusable neglect, which may or may not be

attributable to the defendant.[11] Other circuits, as well as our own, have held that when an administrative agency misleads a complainant, particularly one who is without the benefit of counsel, equitable tolling may be justified.[12] See, e.g.,

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[11] See Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir.) ("Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights."), cert. denied, 112 S. Ct. 198 (1991); Hamilton v. Komatsu Dresser Indus., Inc., 964 F.2d 600, 605 (7th Cir.) (concluding equitable tolling is based in part on "the plaintiff 's excusable ignorance of the limitations period"), cert. denied, 113 S. Ct. 324 (1992).

[12] Although most of the cases cited involve misleading correspondence or information from the EEOC, and the letter in this case came from the MDHR, we do not find that a meaningful distinction. The worksharing agreement between the EEOC and the MDHR provides that "[i]n order to facilitate the filing of charges of employment discrimination, the EEOC and the [MDHR] each designate the other as its agent for the purpose of receiving and drafting charges." See Worksharing Agreement Between Minnesota Department of Human Rights and Equal Employment Opportunity Commission for Fiscal Year 1995 at II(A); see also Worthington v. Union Pac. R.R., 948 F.2d 477, 480-81 (8th Cir. 1991) (finding the Nebraska Equal Opportunity Commission an agent of the EEOC under the relevant worksharing agreement).

Warren v. Department of the Army, 867 F.2d 1156, 1160-61 (8th Cir. 1989) (permitting equitable tolling of the statute of limitations in Title VII action in part because of misleading right-to-sue letter issued by EEOC); Early v. Bankers Life & Casualty Co., 959 F.2d 75, 81 (7th Cir. 1992) (citing misleading conduct by the EEOC as a basis for equitable tolling); Blumberg v. H.C.A. Management Co., 848 F.2d 642, 644 (5th Cir. 1988) (finding that misleading information from the EEOC may justify equitable tolling), cert. denied, 488 U.S. 1007 (1989); Martinez v. Orr, 738 F.2d 1107, 1111-12 (10th Cir. 1984) (finding equitable tolling appropriate where notice from EEOC misled pro se claimant regarding the finality of EEOC action).

Unisys urges that Anderson cannot rely on the letter from the MDHR as a basis for equitably tolling the administrative filing period because the letter does not contain any misinformation or misrepresentations, but merely fails to include all relevant information. We disagree. In Warren, a federal employee brought suit against the wrong defendant because a letter from the EEOC did not make clear the correct party to be sued. As in this case, the letter did not make any affirmative misrepresentations, but rather used ambiguous and misleading language. We are convinced that the letter Anderson received from the MDHR, like the letter Warren received from the EEOC, would easily mislead a claimant unassisted by counsel. As previously mentioned, the MDHR was acting as the agent of the EEOC in issuing the letter. We conclude the MDHR's representation that the deadline was one year would lead a reasonable person to believe that the represented deadline governed the filing of both the federal and state administrative charges. On that

basis, we find the letter sufficient to equitably toll the federal limitations period in this case."[13]

JOINDER OF ADDITIONAL PLAINTIFFS

We next consider whether the district court erred in dismissing all plaintiffs except Anderson and Nielsen for failure to file a timely suit after they received their right-to-sue letters. Anderson's amended complaint filed in June 1992 alleged for the first time that Unisys had also discriminated against several other employees on the basis of age and sought to join these other plaintiffs in a representative action under 29 U.S.C. § 216(b). The district court refused to certify the suit as a representative action, but permitted these additional plaintiffs to join as individual parties.

Later, Unisys filed a motion to dismiss all plaintiffs, except Anderson and Nielsen, on statute-of-limitations grounds because they had received right-to-sue letters from both the MDHR and EEOC, consulted an attorney, and deliberately failed to file suit within the requisite number of days after receiving their letters. Thus, Unisys claimed that both the federal and state statutes of limitations had run on all

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[13] As previously indicated, the district court found that if Anderson could show the EEOC administrative filing period should be equitably tolled, all of the other plaintiffs could take advantage of the "timely" filing of the EEOC administrative charge. See supra note 6.

of the claims except those of Anderson and Nielsen.[14] The district court refused to permit the sixth amended complaint, which joined the additional parties, to relate back to the first, except with respect to plaintiff Nielsen, because of prejudice to Unisys. On that basis, it dismissed the claims of all plaintiffs except Anderson and Nielsen. The district court reasoned that those plaintiffs who had received their right-to-sue letters and thereafter deliberately decided not to file suit within the statute of limitations should be dismissed, but that Nielsen could continue to pursue his ADEA claim. We agree with the district court that the failure of those plaintiffs to file

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[14] The Civil Rights Act of 1991, which went into effect November 21, 1991, changed the applicable statute of limitations in ADEA actions. The previous statute of limitations was two years from the date of the discriminatory conduct, or three years from that date for wilful violations. See 29 U.S.C. § 626(e) (1988) (repealed 1991); 29 U.S.C. § 255 (1982). The Civil Rights Act of 1991 repealed that statute of limitations and replaced it with one requiring that any civil action be filed within 90 days of receiving a right-to-sue letter from the EEOC. 29 U.S.C. § 626(e) (Supp. 1993). On appeal, Anderson argues the district court erred in applying the new statute of limitations and that it instead should have applied the old two or three-year statute of limitations. Appellants apparently did not raise this argument in the district court when Unisys moved to dismiss the ADEA claims of all plaintiffs except Anderson and Nielsen. See Anderson v. Unisys, No. CV 4-92-138, slip op. at 6 n.2 (October 20, 1993) ("The parties agree that the Civil Rights Act of 1991 applies to this case."). Because this argument was not raised below, we do not address it here.

suit within ninety days after the receipt of their right-to-sue letters precludes them from joining Anderson's suit. They were given an opportunity to bring suit upon the issuance of the right-to-sue letter and failed to timely do so.

Nevertheless, appellants urge the district court erred in failing to follow the Supreme Court's decision in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), and claim that case should control the outcome here. In American Pipe, the Court held:

> [W]here class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

Id. at 552-53 (quoting Fed. R. Civ. P. 23(a)). Appellants' reliance on the American Pipe rule is misplaced. In American Pipe, the Court stressed the rule was "in no way inconsistent with the functional operation of a statute of limitations" because "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation . . . ." Id. at 554-55. Here, the statute of limitations had run on the claims of all the parties who had received right-to-sue letters, with the exception of Anderson, before Anderson ever purported to file on behalf of a class of similarly situated employees in June 1992. Unisys therefore

did not know it was facing multiple litigants in a representative suit until after both the state and federal statutes of limitations had run. The American Pipe rule does not operate to revive stale claims, but rather tolls the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action. Thus, the district court did not err in failing to apply the American Pipe rule.

Unisys did not move the district court to dismiss Nielsen's ADEA claim on statute-of-limitations grounds, and has not suggested we do so here. It is somewhat ironic, however, that Nielsen, who did not even file an administrative charge, is permitted to continue in this action while the others have been dismissed, and we believe that result requires a brief explanation. As we already indicated, the Civil Rights Act of 1991 altered the statute of limitations in ADEA cases. See supra note 13. The new statute of limitations is ninety days from the receipt of a right-to-sue letter from the EEOC. 29 U.S.C. § 626(e) (Supp. 1993). Nielsen never received a right-to-sue letter because he did not file an administrative charge.

Our decision in Kloos v. Carter-Day Co., 799 F.2d 397, 400 (8th Cir. 1986), permitted plaintiffs who had not filed administrative charges to "piggyback" on the timely filing of an administrative charge filed by another claimant who purported to represent the interests of a class of similarly situated employees. We held "it is sufficient for one or more plaintiffs to the action to have properly filed a charge." Id. For those plaintiffs who have never filed an administrative charge and who are allowed to piggyback on the filed claim of another, we deem it reasonable to permit them to join suit

as long as the claimant on whose administrative filing they have relied timely files suit after receiving right-to-sue letters from the state and federal agencies.

Those plaintiffs who do file administrative charges, however, should be bound by the statute of limitations, which is normally stated in the right-to-sue letter. Even if those plaintiffs are piggybacking on another employee's timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters. Thus, any claimant who files an administrative charge and receives a right-to-sue letter from the EEOC must file suit within ninety days after receiving that letter to preserve the cause of action.

STATE CLAIMS

Finally, we affirm the district court's dismissal of the state claims of Anderson and Nielsen. Anderson filed his original complaint in February 1992, but it was never served on Unisys. The first amended complaint was served on Unisys in June 1992. Under Federal Rule of Civil Procedure 3, an action is commenced upon the filing of the complaint. Under the comparable Minnesota state procedural rule, however, an action is commenced upon service of process. Minn. R. Civ. P. 3.01. If the federal rule governed, the state claims were timely filed. The district court applied the state rule, however, upon the following reasoning:

> In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court held that in diversity cases, if state law requires service to

> commence an action, state law, and not Federal Rule 3, governs for purposes of state statute of limitations. "The only difference between this case and Walker is that here, the plaintiffs allege both state and federal causes of action, whereas Walker was based on claims under state law and jurisdiction thus was premised solely on diversity of citizenship." Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F.Supp. 1266, 1272 (D. Minn. 1993). There is no logical reason to make a distinction on this basis. Id.

Anderson v. Unisys, No. CV 4-92-138, slip op. at 12 (October 20, 1993). We recently affirmed the case upon which the district court relied, finding "the rationale of Walker does not change 'solely because of the fortuity' that [the plaintiff] pleaded a federal claim along with state claims." Appletree Square 1, Ltd. v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980)). Based on our reasoning in that case, we affirm the decision of the district court dismissing Anderson and Nielsen's state claims because under the state commencement rule, those claims were not timely filed.

CONCLUSION

The district court's entry of summary judgment in Unisys's favor as to the federal claims of Anderson and Nielsen is reversed, and the district court is directed to equitably toll the federal administrative filing period as to them. In all other respects, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Richard Anderson and Norris Nielsen,

Plaintiffs,

CIVIL 4-92-138

v.

MEMORANDUM AND ORDER

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on defendant's motion for reconsideration of the Court's order of December 1, 1993, which denied defendant's motion for summary judgment. The motion for reconsideration will be granted and summary judgment will be entered in favor of defendant.

I. General Background

Plaintiff Richard Anderson was laid off from defendant Unisys Corporation on April 2, 1990. Anderson was forty-nine years old at the time. On March 25, 1991, Anderson filed administrative claims of age discrimination with both the Equal Employment Opportunity Commission (EEOC) and the Minnesota Department of Human Rights (MDHR). As a prerequisite to the maintenance of a suit under federal law, the Age Discrimination in Employment Act (ADEA) requires that administrative charges be filed within 300 days of the adverse employment action. 29 U.S.C. § 626(d). As a prerequisite to the maintenance of a suit under state law, the Minnesota Human Rights Act (MHRA) requires that administrative charges of age discrimination be filed within one year. Minn. Stat. § 363.06, subd. 3. Thus, Anderson met the administrative filing deadline for the MDHR but not the ADEA.

Anderson received a right to sue letter dated October 8, 1991, from the EEOC; he received a similar letter dated December 24, 1991, from the MDHR. On February 10, 1992, Anderson filed a pro se complaint in federal district court alleging age discrimination. That original complaint was never served upon defendant. On June 9, 1992, Anderson filed an amended complaint, prepared with the assistance of counsel, in which he alleged for the first time that a group of similarly-situated employees were discharged because of their age in violation of the ADEA, the MHRA, and Minn. Stat. § 181.81, a statute which prohibits mandatory retirement before the age of seventy. The amended complaint was served on defendant. Defendant subsequently rehired

Anderson and he returned to work on December 13, 1992. Anderson has nevertheless continued to pursue this action.

II. Plaintiff's Motion for Class Certification

In January 1993, Anderson filed a motion for class certification, seeking to invite thirteen specific additional plaintiffs who were laid off during the same time period as Anderson to join this lawsuit. On March 25, 1993, the Court issued a memorandum and order in which the Court began by addressing defendant's argument that Anderson's ADEA claim was barred for failure to file a timely administrative claim with the EEOC and thus there was no point in allowing others to join this action. The Court noted that Anderson's administrative filing was not within 300 days of his dismissal but the Court held that Anderson would be allowed to offer evidence that the administrative period was equitably tolled. Next, the Court held that if the administrative filing period was equitably tolled and thus Anderson's filing was timely, other similarly-situated putative plaintiffs who had not filed timely administrative charges could "piggy-back" their claims to Anderson's claim. The Court found that the putative plaintiffs were similarly situated because they were all laid off from the same department at Unisys during the same general time period. Finally, the Court held that it need not certify the class in order for piggy-backing to be available; rather, plaintiffs who had not filed a timely administrative charge could rely on the timely charge of Anderson in either a class action or a multiple plaintiff joint action. Therefore, the Court denied Anderson's motion for class certification but authorized putative plaintiffs to join in this action as individually-named parties.

III. Defendant's Motion to Dismiss

In response to the Court's March 25, 1993, order, several plaintiffs, who will be referred to collectively as the non-Anderson plaintiffs, joined this lawsuit. All of the non-Anderson plaintiffs, except Donald Woods, were laid off by defendant on April 2, 1990, the same day that Anderson was laid off. Woods was laid off on June 18, 1990. On April 1, 1991, a law firm representing non-Anderson plaintiffs Robert Eggan, Carl Englehorn, Peter Lowry, Timothy Wandersee, and Woods filed age discrimination charges with the EEOC and the MDHR. Because the charges with the EEOC were not filed within 300 days of April 2, 1990, but were filed within 300 days of June 18, 1990, only Woods met the administrative filing deadline for the ADEA. The EEOC issued right to sue letters dated October 8, 1991 (the same date of Anderson's EEOC letter), to Eggan and Englehorn, and issued right to sue letters dated January 31, 1992, to Wandersee, Woods, and Lowry. The MDHR issued right to sue letters dated December 24, 1991 (the same date of Anderson's MDHR letter), to Eggan, Englehorn, Lowry, and Woods. Wandersee's right to sue from MDHR was dated December 27, 1991.

The ADEA provides that a person must file a civil action within 90 days of receiving a right to sue letter from the EEOC. 29 U. S. C. § 626(e). The MHRA provides that a person must file a civil action within 45 days of receiving a right to sue letter from the MDHR. Minn. Stat. 363.14 subd. 1(a). After consultations with attorneys, Eggan, Englehorn, Lowry, Wandersee, and Woods decided not to commence judicial proceedings within these time periods. Only one non-Anderson plaintiff, Norris Nielsen, never filed

an administrative claim with either the EEOC or the MDHR and, thus, never received a right to sue letter from either agency. Moreover, like the other non-Anderson plaintiffs, Nielsen never commenced a judicial proceeding.

In August 1993, defendant moved to dismiss all non-Anderson plaintiffs except Nielsen on statute of limitations grounds. Defendant argued that because these plaintiffs had received right to sue letters, consulted an attorney, and deliberately decided not to pursue litigation before the expiration of the statute of limitations period, they should be bound by those decisions. On October 20, 1993, the Court granted defendant's motion. In reaching its conclusion that the non-Anderson plaintiffs (except Nielsen) should be dismissed, the Court determined that it was necessary to discuss the ADEA and state law claims separately. Addressing the ADEA claims, the Court wrote that:

> Piggy-backing rules apply to administrative filings, and relation back rules apply to court filings. Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1018 (7th Cir. 1988). The Court has already held that the non-Anderson plaintiffs' failure to file a timely EEOC charge is curable provided that Anderson's administrative charge was timely because of equitable tolling. The non-Anderson plaintiffs now ask the Court to also excuse their failure to file suit within ninety days of receiving their right to sue letters.
>
> Federal Rule of Civil Procedure 15(c) provides for the relation back of certain amendments to

the complaint to the date of the original pleading. Fed.R.Civ.P. 15(c). Read literally, the rule covers an amendment adding a new "claim or defense" or an amendment which "changes the party or the naming of the party against whom a claim is asserted." While the rule deals expressly only with amendments changing or adding defendants, courts have found that the rule is also intended to apply to amendments substituting or adding plaintiffs. E.g., Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1308 (D.C. Cir. 1982); Newell v. Harrison, 779 F.Supp. 388, 390-91 (E.D.La. 1991) ("A majority of federal courts hold that an amendment adding plaintiffs who assert the same claim . . . may relate back."); Stoppelman v. Owens, 580 F.Supp. 944, 946 (D.D.C. 1983); Mattson v. Cuyuna Ore Co., 24 F.R.D. 363 (D.Minn. 1959). The central underlying question which the Court must decide to determine whether the non-Anderson plaintiffs should relate back to the time of Anderson's pro se filing is whether the defendant had notice of the potentially numerous claims at the time Anderson's action was commenced and whether relation back would cause defendant undue prejudice. Paskuly v. Marshall Field & Co., 494 F.Supp. 687, 688 (N.D.Ill. 1980), aff'd, 646 F.2d 1211 (7th Cir.), cert. denied, 454 U.S. 863 (1981). Defendant clearly had some notice of these claims. All but one of the plaintiffs filed administrative charges, and plaintiff's first

amended complaint stated an intention to make claims on behalf of similarly situated individuals. The focus of the analysis then shifts to whether allowing the non-Anderson claims to proceed would cause defendant undue prejudice.

The Court finds that defendant would be significantly prejudiced if any of the non-Anderson plaintiffs (except Nielsen) are allowed a second bite at the apple. Although the fact that the amendment exposes defendant to greater damages is not sufficient prejudice to deny relation back, Charles Wright, Arthur Miller & Mary Kay Kane, 6A Federal Practice and Procedure § 1501 at 162 (1990), the general purposes of the statute of limitations would be frustrated by allowing relation back. Statutes of limitations are "intended to secure repose for defendants -- to let them go about their business, after a definite time, untroubled by fear of being sued." Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990). There is no evidence that the failure of the non-Anderson plaintiffs who filed their own administrative charges to file suit within the limitations period was due to any mistake or inadvertence, or any action by defendant. Defendant emphasizes the fact that five of the non-Anderson plaintiffs received right to sue letters and deliberately decided not to file lawsuits after receiving legal advice. The Court finds this argument persuasive. See

> United States v. Kubrick, 444 U.S. 111, 123 (1979) ("A plaintiff . . . armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community."); Manildra Milling Corp. v. Ogilvie Mills, Inc., 746 F.Supp. 40, 42 (D.Kan. 1990) (no relation back against a new defendant because plaintiff made a "conscious decision" to leave that defendant out of the original complaint). Under all the circumstances, the Court can only conclude that the non-Anderson plaintiffs (except Nielsen) made a deliberate and considered decision not to proceed and to allow the statute of limitations to run. Accordingly, the Court will dismiss all of the non-Anderson plaintiffs, except Nielsen. While this conclusion may seem harsh, the application of the statute of limitations is almost always harsh. Courts have nevertheless consistently respected legislative policy decisions as to when a claim becomes stale. Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

Memorandum and Order at 9-11.

The Court then addressed plaintiffs' MHRA claims:

> The Court has already concluded that it would cause defendant undue prejudice to allow the non-Anderson plaintiffs, except Nielsen, to relate their ADEA claims back to the date that

Anderson filed his original complaint. The same reasoning applies to the MHRA claims. However, with respect to Anderson's and Nielsen's MHRA claims, an additional statute of limitations issue arises. Anderson filed his complaint on February 10, 1992, but did not serve defendant until June 1992. A person must bring a civil action within forty-five days of receiving a right to sue letter from the MDHR. Minn. Stat. § 363.14. Under Federal Rule of Civil Procedure 3, an action is commenced by filing a complaint. Under Minnesota Rule of Civil Procedure 3.01, an action is commenced upon service of process. The parties agree that if the Federal Rule governs Anderson's MHRA claim was timely; if the Minnesota Rule applies, his claim is time-barred.

The Court concludes that Minnesota Rule 3.01 applies and Anderson's MHRA claim is time-barred. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court held that in diversity cases, if state law requires service to commence an action, state law, and not Federal Rule 3, governs for purposes of state statute of limitations. "The only difference between this case and Walker is that here, the plaintiffs allege both state and federal causes of action, whereas Walker was based on claims under state law and jurisdiction thus was premised solely on diversity of citizenship." Appletree Square 1 Ltd. v. W. R.

> Grace & Co., 815 F.Supp. 1266, 1272 (D.Minn. 1993). There is no logical reason to make a distinction on this basis. Id. The Court finds that state law rules apply. Concordia College Corp. v. W. R. Grace & Co., 999 F.2d 326, 330-31 (8th Cir. 1993); Witherspoon v. Roadway Express, Inc., 782 F.Supp. 567 (D.Kan. 1992) (state law discrimination claim dismissed as untimely but Title VII claim not dismissed). Because Anderson did not serve defendant until June 9, 1993, under Minnesota law his action under the MHRA was not commenced within forty-five days of receipt of the right to sue notice and that claim is time barred. Thus, Anderson's MHRA claim is untimely and Nelson may not relate his claim back to it.

Memorandum and Order at 11-13.

Finally, the Court addressed plaintiffs' claims under Minn. Stat. § 181.81:

> Minn. Stat. § 181.81 forbids private sector employers from adopting mandatory retirement policies for employees under the age of seventy. The statute of limitations for a claim under section 181.81 is two years. Kyllo v. Farmers Cooperative of Wanamingo, Minnesota, 723 F.Supp. 1332, 1337 (D.Minn. 1989); Minn. Stat. § 541.07(5). Defendant argues that these claims are barred by the statute of limitations. Plaintiffs offer two

> arguments. First, plaintiffs argue that the this cause of action relates back to the time the original complaint was filed and thus is timely. Second, plaintiffs argue that the Court should find that the two-year statute of limitations was equitably tolled.
>
> The statute of limitations on Anderson's section 181.81 claim expired on April 2, 1992. Anderson filed his original complaint in February 1992 but did not serve defendant until June 1992. For the reasons stated above about commencement of a state cause of action for statute of limitations purposes, the Court finds that Anderson's section 181.81 claims is time barred. Moreover, plaintiffs offer no facts in support of equitable tolling. Thus, these claims will be dismissed.

Memorandum and Order at 13. In short, after careful consideration, the Court dismissed the ADEA claims of all plaintiffs except Anderson and Nielsen, and dismissed the state law claims of all plaintiffs including Anderson and Nielsen. Plaintiffs immediately filed a motion asking the Court to reconsider the October 20, 1993, order. Plaintiffs' motion for reconsideration was denied on November 24, 1993.

IV. Defendant's Motion for Summary Judgment

As the Court's March 25, 1993, and October 20, 1993, orders make clear, the Court and the parties have understood all along that plaintiffs' claims depend on a finding of

equitable tolling. The ADEA requires employers to post "in conspicuous places upon its premises" a notice of rights under the Act. 29 U.S.C. § 627. The statutory notice may be posted at a location other than where the employee works on a daily basis if the employee actually visits the other location and has "reasonable access" to the notice. Heideman v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991). However, the ADEA's administrative charge filing deadline may be subject to equitable tolling if the employer fails to post the required statutory notice of rights. DeBrunner v. Midway Equip. Co., 803 F.2d 950, 952 (8th Cir. 1986). The employee has the burden of establishing that proper notice was not posted. Beshears v. Asbill, 930 F.2d 1348, 1352 (8th Cir. 1991). The employee cannot meet this burden by merely stating that he or she did not see the notice. Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 719 (8th Cir. 1982). If the employee establishes that adequate notice was not posted, the burden then shifts to the employer to establish that the employee had either knowledge of his or her right not to be discriminated against on account of age, or the means of obtaining such knowledge. Beshears, 930 F.2d at 1352.

On December 1, 1993, defendant moved for summary judgment against Anderson and Nielsen on their ADEA claims, the only claims remaining in this lawsuit, on the grounds that no genuine issue of material fact existed on the issue of equitable tolling. Defendant offered two arguments. First, defendant asserted that it had offered uncontradicted evidence that notice was posted and that Anderson had "reasonable access" to that notice. Defendant presented evidence that notice was posted in the human resources office

at defendant's Unisys Eagandale Center (UEC) Building in Eagan, Minnesota. Although Anderson did not work in the UEC Building, defendant pointed out that Anderson admitted to visiting the human resources office in the UEC Building both before and after the layoff. Defendant also cited an audit of defendant's equal employment opportunity policies and practices conducted by the Office of Federal Contract Compliance Programs (OFCCP) as additional evidence of proper posting. The audit concluded that, subject to the implementation of commitments detailed in a separate letter, defendant's policies and practices were in compliance with federal law. The letter of commitment made no mention of failure to adequately comply with notice-posting requirements. Defendant argued that this evidence established that plaintiffs would be unable to meet their burden of proof on the issue whether defendant had posted adequate notice. Second, defendant argued that even if Anderson could establish that a genuine issue of fact existed on the question of the posting of adequate notice, it was nevertheless entitled to summary judgment because Anderson was generally aware at the time of his layoff of his right not to be discriminated against on the basis of age. Defendant pointed out that Anderson had admitted that he was aware at the time of his layoff that age discrimination was illegal. Defendant also argued that equitable tolling was inappropriate because the plaintiff is well-educated thus he had the means to obtain information concerning his rights.

Plaintiffs responded with several arguments. First, plaintiffs argued that defendant had waived any right to offer evidence that the statutorily required notice was posted. Plaintiffs asserted that because defendant did not raise the defense of untimely filing in either its answer or its statement

of the case, the defense had been waived. Although plaintiffs acknowledged that they were generally aware that defendant intended to present a posting defense, plaintiffs asserted that defendant's failure to present specific evidence of notice posting until recently has been calculated to prejudice plaintiffs. Second, plaintiffs argued that defendant was estopped from asserting a timeliness defense because defendant misrepresented to plaintiff that the layoffs were part of a reduction in force and this misrepresentation somehow prevented plaintiffs from discovering that the true reason for their discharge was age. Third, plaintiffs argued that the posting of notice in the UEC Building did not satisfy the statute's requirement that notice be in a conspicuous place to which plaintiff had reasonable access. Fourth, plaintiffs asserted that although Anderson was generally aware that age discrimination was illegal, he was not aware that he was a member of the class protected by the ADEA. Anderson was forty-nine years old when he was laid off and he stated that he thought that the ADEA's protections applied only to those persons fifty years or older. Finally, plaintiffs argued that not only was Anderson unaware of his rights under the ADEA, he did not have the means to obtain knowledge of those rights because he did not retain an attorney until after he filed his complaint.

At the conclusion of the hearing on December 1, 1993, the Court ruled from the bench, denying defendant's motion for summary judgment. As an initial matter, the Court found that waiver and estoppel did not bar defendant from asserting the defense that Anderson's administrative charge with the EEOC was untimely. However, the Court noted that plaintiffs could still overcome that defense if they could show that equitable tolling should apply. The Court

found that a fact question existed as to whether plaintiff had "reasonable access" to a notice of ADEA rights because, although there was undisputed evidence that defendant posted a notice of ADEA rights in the human resources office in the UEC Building, Anderson had not been to the UEC Building for at least eighteen months prior to his discharge. The Court then noted that defendant would still [sic] entitled to summary judgment on the equitable tolling issue if it could establish that Anderson had sufficient knowledge of his rights under the ADEA, or the means to obtain such knowledge. Anderson stated that he had an "imprecise understanding" of age discrimination laws and thought that they did not protect him. Second Anderson Aff. ¶ 2. Recognizing that the burden was on defendant to establish general knowledge, Beshears, 930 F.2d at 1352, the Court concluded that a fact-finder should determine whether Anderson's "imprecise understanding" of the ADEA constituted general knowledge, or whether Anderson had the means to obtain such knowledge. Accordingly, defendant's motion for summary judgment was denied.[1]

[1] There was also an issue as to whether plaintiff Nielsen had introduced sufficient evidence to establish a prima facie case. The Court found that Nielsen had introduced sufficient evidence. That determination is not challenged on defendant's motion for reconsideration.

V. Defendant's Motion for Reconsideration of Order Denying Summary Judgment

A. New Evidence

In response to the Court's December 1, 1993, ruling, defendant began searching for evidence that the statutorily required notice of ADEA rights was posted not only in the UEC Building, but also in Corporate Square D, the building in which Anderson worked. After the Court's December 1 order, defendant interviewed several guards who were occasionally stationed in the lobby of Corporate Square D.[2] Four guards, two of whom are currently employed by defendant and two of whom are former employees, have presented affidavits in which they claim to recall seeing large colorized notices at the entrances to Corporate Square D prior to the time of Anderson's layoff. Affidavit of Dan Dullum ¶ 4-5; Affidavit of Marvin Stutz ¶ 4-6; Affidavit of Ron Scritchfield ¶ 5-9; Affidavit of Ray Garcia ¶ 5-9. Defendant argues that because of this evidence, plaintiffs cannot meet their burden of proof on the issue of the absence of notice.

In response to defendant's presentation of this "new evidence," plaintiffs' attorney immediately deposed the four guards. The two former guards stated that they specifically remember seeing "Equal Opportunity is the Law" posters on

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[2] Defendant is a defense contractor and is therefore required by law to observe a number of security precautions, including restricting access to its buildings. Defendant stations security guards in the lobbies of and at the employee entrances to its buildings.

the boards near the entrances because, due to their size and color, the posters were eye-catching. Deposition of Marvin G. Stutz at 51; Deposition of Daniel J. Dullum at 12. However, the two former guards did not remember seeing several other notices which are required by law. Plaintiffs allege that this selective recollection casts doubt on the former guards' credibility. Plaintiffs also allege that the two guards who remain employed by defendant are concerned about future layoffs and thus there is reason to believe that they have offered this testimony in order to protect their jobs. However, plaintiff's legal argument in opposition to defendant's motion for reconsideration does not press these credibility and bias allegations. Rather, plaintiffs argue that because of alleged misconduct by defendant during the discovery process, the Court should enter judgment in favor of plaintiffs on the equitable tolling issue. Plaintiff also argues, for the first time, that the Court should find as a matter of law that equitable tolling is unnecessary because defendant's alleged discriminatory acts constituted a continuing violation and Anderson's administrative claim was filed within 300 days of the end of the violation period. In the alternative, plaintiffs request that the Court allow plaintiffs to depose additional witnesses to probe into the issue of why the "new evidence" on the posting of ADEA notice in Corporate Square D was not discovered earlier.

B. Summary Judgment Standard

A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only

by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." AgriStor Leasing, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987), cert. denied, 108 S.Ct. 707 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

C. Analysis

In response to defendant's motion for reconsideration, plaintiffs have again argued that defendant has waived the timeliness defense because it has not offered evidence in support of the defense until now and because defendant has

engaged in misconduct during the discovery process.[3] Once

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[3] In opposition to defendant's motion for summary judgment, plaintiffs also raised an estoppel argument. Plaintiffs argued that defendant should be estopped from asserting a timeliness defense because it misrepresented to plaintiffs that they were being laid off because of a reduction in force not because of their age. The Court concluded that plaintiffs' argument was without merit. In reaching that conclusion, the Court was guided by Heideman v. PFL, Inc., 904 F.2d 1262 (8th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991), in which the Eighth Circuit wrote:

> The Heidemans argue that PFL affirmatively concealed from Leo Heideman the reason for this discharge because it did not tell him he was fired for being too old. We have no doubt that is so. No employer is likely to admit to the disadvantaged employee a flagrant violation of a federal law against discrimination on the basis of age, race, or gender. Whether or not an employer tell its employee the true reasons for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions. The Heidemans have not adduced facts to show that the delayed filing was "due to the employer's concealment, misrepresentation or failure to post notice." Nielsen v. Western Elec. Co., 603 F.2d 741, 743 (8th Cir. 1979). There is nothing on the

again, the Court finds that defendant has not waived an untimely administrative filing defense. Absent unusual circumstances, an untimely administrative filing defense may be raised for the first time on a motion to dismiss or motion for summary judgment. See Sanders v. Dept. of the Army, 981 F.2d 990, 991 (8th Cir. 1992). Although plaintiffs claim to be surprised by the fact that defendant is asserting a timeliness defense, it has been clear all along that defendant would make an issue of Anderson's late administrative filing. Defendant raised the issue in its memorandum in opposition to plaintiffs' motion for class certification in January 1993. In ruling on that motion, the Court stated that "whether defendant posted notice and whether plaintiff was generally aware of his rights are disputed issues that, on this motion,

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> record to indicate that the company successfully misled Heideman or prevented him from discovering or pursuing his rights under the ADEA.

904 F.2d at 1266. Heideman makes clear that plaintiffs must offer evidence which would support a finding that their failure to pursue ADEA remedies was caused by something more than the mere fact that defendant did not admit that plaintiffs were fired because of their age. See also Glass v. IDS Financial Services, Inc., 778 F.Supp. 1029, 1047 (D.Minn. 1991) ("the proper inquiry is whether an employer successfully misled plaintiffs regarding the nature of their ADEA rights or prevented them from discovering or pursuing those rights"). Plaintiffs do not specifically reassert this estoppel argument in their memorandum in opposition to defendant's motion for reconsideration.

are construed in plaintiff's favor." March 25, 1993, Memorandum and Order at 10. Moreover, the Court's order of October 20, 1993, made clear that the merits of plaintiffs' equitable tolling argument had yet to be addressed by the Court.

The Court also rejects plaintiffs' request to strip defendant of this defense because of defendant's alleged lack of candor during the discovery process. The gist of plaintiffs' argument is that defendant has attempted to hide evidence of posting and then spring it on plaintiffs, first at the time of defendant's summary judgment motion, and now in connection with this motion for reconsideration. The Court rejects this request for two main reasons. First, plaintiffs apparently brought several motions to compel discovery, but eventually withdrew each motion after the disputes were resolved to their satisfaction. While there is much evidence that the parties did not fully cooperate during discovery, there is no evidence of a pattern of bad faith. Second, the Court cannot discern any motive for defendant to hide evidence of posting in Corporate Square D or elsewhere. While it appears that defendant was not overly diligent in determining all locations where notice was posted, this is not grounds for excluding evidence. In addition, plaintiffs have had the opportunity to depose the new witnesses and probe into the sources of the witnesses' knowledge. The Court is aware that plaintiffs have expended substantial time and resources pursuing this litigation which might have been spared had defendant presented this evidence earlier. However, there is no legal justification to bar otherwise admissible and highly relevant evidence just because the opposing party has invested much in the litigation.

Accordingly, the Court will consider defendant's "new evidence."

The Court concludes that, based on defendant's "new evidence" of postings in Corporate Square D, the building in which Anderson worked, it is clear that plaintiffs will not be able to prove that defendant failed to comply with statutory notice requirements. Beshears v. Asbill, 930 F.2d 1348, 1352 (8th Cir. 1991). The notice was posted "upon the premises" which Anderson worked, 29 U.S.C. § 627, and thus he clearly had "reasonable access" to that notice. Heideman v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991). Anderson's claim that he never saw the notice does not create a material factual dispute. Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 719 (8th Cir. 1982). Moreover, plaintiff may not create a fact question merely by pointing out that witnesses may be biased or their memories may be faulty.

The Court notes that the "new evidence" is not the only evidence that defendant posted the required notice in a location to which Anderson had "reasonable access." The OFCCP audited defendant's employment policies and practices and found them to be satisfactory. The form on which OFCCP auditors prepare their reports specifically provides that the auditor must "VERIFY THAT CONTRACTOR HAS . . . POSTED NOTICE OF ITS OBLIGATIONS/EEO POSTERS IN CONSPICUOUS PLACES." Affidavit of Thomas Sipkins Exh. E ¶ 2410. The OFCCP's 1987 report specifically listed five problems that defendant should respond to; notice posting was not one of those problems. See Affidavit of Ivo Franulic Exh. B. Courts generally consider this type of evidence to be

persuasive. For example, in Byers v. Follmer Trucking Co., 763 F.2d 599 (3rd Cir. 1985), there was no definitive testimony or documentary evidence that notice had been posted. However, the defendant introduced evidence that it routinely conducted self-inspections to determine whether it was in compliance with federal employment laws. The inspector was responsible, among other things, for insuring that all required notices were properly displayed. At no time had an inspector found the posting notice to be lacking. The court held that the inspection procedure supported an inference that the defendant had complied with the ADEA posting requirements. In the case at bar, defendant has been certified by the OFCCP to be in compliance with federal employment policies. While at the time of defendant's motion for summary judgment the Court did not consider the OFCCP audit to be sufficient evidence, without more, to decide the equitable tolling issue, when this evidence is combined with the "new evidence" defendant has offered, it convinces the Court that no reasonable jury could find that Anderson did not have "reasonable access" to a notice of his rights under the ADEA. Therefore, Anderson's equitable tolling claim fails as a matter of law. See Morse v. Daily Press, Inc., 826 F.2d 1351, 1353 (4th Cir.), cert. denied, 108 S.Ct. 455 (1987) (notice adequate as a matter of law); Berry v. Joseph E. Seagram & Sons, Inc., 744 F.Supp. 214, 217 (C.D.Cal. 1990) (same).

The Court also rejects plaintiffs' argument, which is raised now for the first time, that defendant's layoff practices amounted to a continuing violation of the ADEA and thus a finding of equitable tolling is not necessary. "The continuing violation theory is generally inapplicable to discharge cases, since a discharge is perhaps the clearest example of a single,

rather than continuing, event." 2 Arthur Larson and Lex K. Larson, Employment Discrimination, § 48.13(g)(1) at 9A-70 (1993). "The continuing violation doctrine does not exist to give a second chance to an employee who allowed a legitimate [ADEA] claim to lapse." Roberts v. Gadsden, 835 F.2d 793, 800 (11th Cir 1988).

Finally, the Court will not grant plaintiffs' request to depose additional witnesses to probe into why evidence of the posting of notice in Corporate Square D was not discovered earlier. Plaintiffs give no indication what they hope to learn during these additional depositions. See Fed.R.Civ.P. 56(f). The Court concludes that it is appropriate to enter judgment at this time.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. defendant's motion for reconsideration is granted; and

2. defendant's motion for summary judgment is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

_____

Judge Harry H. MacLaughlin
United States District Court

DATED: _____, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Richard Anderson, Robert Eggan, Carl Englehorn, Norris Nielsen, Timothy Wandersee, Donald Woods, Peter Lowry,

Plaintiffs,

CIVIL 4-92-138

v.

MEMORANDUM AND ORDER

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich, & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on defendant's motion to dismiss several plaintiffs and defendant's motion to bifurcate issues for trial, stay discovery, and extend the pretrial schedule. Defendant's motion to dismiss several plaintiffs will be granted. Defendant's motion to bifurcate issues for trial, stay discovery, and extend the pretrial schedule will be denied.

FACTS

The following facts are relevant to these motions. This age discrimination action was commenced by plaintiff Richard Anderson. Anderson was laid off from defendant Unisys Corporation on April 2, 1990. As a prerequisite to the maintenance of a suit under federal law, the Age Discrimination in Employment Act (ADEA) requires that administrative charges be filed within 300 days of the adverse employment action. 29 U.S.C. § 626(d). As a prerequisite to the maintenance of a suit under state law, the Minnesota Human Rights Act (MHRA) requires that administrative charges of age discrimination be filed within one year. Minn. Stat. § 363.06, subd. 3. Anderson filed an administrative charge of age discrimination with the Minnesota Department of Human Rights (MDHR) and the Equal Employment Opportunity Commission (EEOC) on March 25, 1991. Thus, Anderson met the administrative filing deadline for the MDHR but not the ADEA.

On December 24, 1991, the MDHR sent Anderson a right to sue letter informing him that he had forty-five days to file suit under state law. Anderson received that letter on December 26. Anderson apparently received his right to sue

letter from the EEOC on January 31, 1992.[1] On February 10, 1992, Anderson filed a pro se complaint in federal district court alleging age discrimination. That original complaint was never served upon defendant. On June 9, 1992, Anderson filed an amended complaint, prepared with the assistance of counsel, in which he alleged for the first time that a group of similarly-situated employees were discharged because of their age in violation of the ADEA, the MHRA, and Minn. Stat. § 181.81, a statute governing mandatory retirement. The amended complaint was served on defendant. Defendant subsequently rehired Anderson and he returned to Unisys on December 13, 1992. Nevertheless, Anderson has continued to pursue this action.

In January 1993, Anderson filed a motion for class certification, seeking to invite thirteen specific additional plaintiffs who were laid off during the same time period as Anderson to join this lawsuit. On March 25, 1993, the Court issued a memorandum and order declining to certify the class but authorizing those thirteen putative plaintiffs to join the suit as individually-named parties. Addressing defendant's argument that Anderson's ADEA claim was time barred for failure to file a timely administrative claim, the Court noted that Anderson's administrative filing was not within 300 days of his dismissal but the Court concluded that Anderson may

---

[1] Anderson's right to sue letter does not appear to be part of the record before the Court. In connection with this motion, defendant has provided a copy of plaintiff Timothy Wandersee's right to sue letter from the EEOC. Def.'s Hem. Supp. Mot. Partial Summ. J. Exh. A. Wandersee's letter is dated January 31, 1992.

be able to show that the administrative period was equitably tolled. Next, the Court held that if the administrative statute of limitations was equitably tolled and thus Anderson's filing was timely, other similarly-situated putative plaintiffs who had not filed timely administrative charges could "piggy-back" their claims to plaintiff's claim. The Court found that the putative plaintiffs were similarly situated because they were all laid off from the same department at Unisys during the same general time period. Finally, the Court held that it need not certify the class for piggy-backing to be available; rather, plaintiffs who have not filed a timely administrative charge can rely on the timely charge of another plaintiff in a class action or in a multiple plaintiff joint action. Therefore, the Court denied Anderson's motion for class certification but authorized putative plaintiffs to join this action as individually-named parties.

In response to the Court's order, several plaintiffs, who will be referred to collectively as the non-Anderson plaintiffs, joined this lawsuit. All of the plaintiffs who have joined this action, except Donald Woods, were laid off by defendant on April 2, 1990, the same day that Anderson was laid off. Woods was laid off on June 18, 1990. On April 1, 1991, a law firm representing plaintiffs Robert Eggan, Carl Englehorn, Peter Lowry, Timothy Wandersee, and Woods filed age discrimination charges with the EEOC and the MDHR. Thus, these non-Anderson plaintiffs met the administrative filing deadline of the MDHR (one year), but only Woods's EEOC administrative claim was timely under the ADEA (300 days). Only one non-Anderson plaintiff, Norris Nielsen, has never filed an administrative claim with either the EEOC or the MDHR.

In separate letters dated December 24, 1991, the MDHR notified Eggan, Englehorn, Lowry, and Woods that no further action would be taken on their claims and that they had forty-five days in which to institute litigation under state law. In a letter dated December 27, 1991, the MDHR provided Wandersee with the same information. The EEOC, in letters dated January 31, 1992, informed these five plaintiffs that the EEOC would take no further action and they were free to bring an action in federal court under the ADEA. After consultations with attorneys, all five plaintiffs decided not to commence judicial proceedings.

Defendant has now moved to dismiss Nielsen's section 181.81 claim, and to dismiss all claims by the other five non-Anderson plaintiffs. Defendant also seeks bifurcation of the trial, a stay of discovery, and an extension of the pretrial schedule.

DISCUSSION

I. Motions to Dismiss

In reviewing a motion to dismiss for failure to state a claim the Court presumes all factual allegations to be true and all reasonable inferences from those allegations are construed in favor of the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Palmer v. Tracor, Inc., 856 F.2d 1131, 1132 (8th Cir. 1988). The appropriate inquiry is not whether plaintiff will ultimately prevail but whether he will be allowed to introduce evidence to support his claims. Scheuer, 416 U.S. at 236. Because dismissal on the pleadings is an extreme remedy it is not favored by the courts and is employed only when "it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). Robinson v. MFA Mutual Insurance Co., 629 F.2d 497, 500 (8th Cir. 1980). See also Palmer, 856 F.2d at 1132.

A. Age Discrimination Claims

The Civil Rights Act of 1991 "drastically altered the statute of limitations applicable to ADEA claims." McConnell v. Thomson Newspapers, Inc., 802 F.Supp. 1484, 1493 (E.D.Tex. 1992).[2] Until 1991, the ADEA provided that a plaintiff had 300-days to file an administrative charge and two years to commence a civil action (three years if the violation was willful), both time periods beginning to run as of the date of the adverse employment action. See Beshears v. Asbill, 930 F.2d 1348, 1356 n.12 (8th Cir. 1991). In the Civil Rights Act of 1991, Congress repealed the two-year statute of limitations for filing a civil action. However, a plaintiff still must bring an ADEA civil lawsuit within ninety days of receiving a right to sue letter from the EEOC. 29 U.S.C. § 626(e) (West Supp. 1993); McConnell, 802 F.Supp. at 1493.

The administrative filing requirement and statute of limitations under the MHRA differ from the administrative filing requirement and statute of limitations under the ADEA. Under the MHRA, a person has one year to file an

[2] The parties agree that the Civil Rights Act of 1991 applies to this case. The Civil Rights Act of 1991 became effective November 21, 1991.

administrative claim and forty-five days after a right to sue letter is issued by the MDHR to commence a judicial proceeding. Minn. Stat. § 363.06, subd. 3; § 363.14. All of the plaintiffs in this action, except Nielsen, filed administrative claims with the MDHR within one year of being laid off. However, none of the non-Anderson plaintiffs that filed administrative claims commenced a judicial proceeding within forty-five days of receiving a right to sue letter for the MDHR.

The Court's March 25, 1993, order was limited to the question whether the putative plaintiffs would be permitted to piggy-back untimely EEOC charges onto Anderson's EEOC charge, which, again, is timely only if equitable tolling is found to apply. In connection with the motion for class certification, the parties did not address, and the Court did not consider, whether the putative plaintiffs' claims might be barred by the statute of limitations.

Defendant argues that only Nielsen, who filed neither an administrative charge nor a lawsuit, should be allowed to depend on Anderson's filings. Defendant argues that because the other five non-Anderson plaintiffs filed administrative charges, they should have filed suit within ninety days of receiving right to sue letters from the EEOC. Defendant points out that those five plaintiffs were all represented by counsel at the time they received their right to sue letters and they made informed and deliberate decisions, after consultations with counsel, not to proceed in court. Defendant argues that allowing these plaintiffs to join this action would give them a second bite at the apple; it would revive rights these plaintiffs deliberately waived over a year

before they were invited to join this action through the Court's March 25, 1993 order.

Plaintiffs argue that if the Court allows Nielsen's claim to proceed but dismisses the other five non-Anderson plaintiffs, the Court will be punishing those who specifically put defendant on notice that they felt they had been victims of discrimination. Plaintiffs also argue that they were given poor legal advice after they received their right to sue letters. Based upon these facts, plaintiffs assert that the Court should find that the sixth amended complaint, through which the non-Anderson plaintiffs joined this lawsuit, relates back to the original complaint that Anderson filed pro se on February 10, 1992, and therefore their age discrimination claims are not barred by the statute of limitations.

Defendant filed a reply memorandum to specifically address plaintiffs' relation back argument. Defendant addresses plaintiffs' ADEA and state law claims separately. Relying on authorities from outside this circuit, defendant argues that the non-Anderson's ADEA claims could relate back to Anderson's filing only if there was evidence of mistake or inadvertence. Defendant asserts that relation back cannot apply here for the five plaintiffs who received right to sue letters and made a conscious decision not to proceed. Defendant also argues the state law claims cannot relate back because, under the Minnesota Rules of Civil Procedure, an action is not commenced until the defendant is served and in this case defendant was not served until June 9, 1992. Thus, defendant argues that even Anderson's claim under the MHRA is time barred. It is necessary to discuss the ADEA and MHRA claims separately.

1. ADEA

Piggy-backing rules apply to administrative filings, and relation back rules apply to court filings. Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1018 (7th Cir. 1988). The Court has already held that the non-Anderson plaintiffs' failure to file a timely EEOC charge is curable provided that Anderson's administrative charge was timely because of equitable tolling. The non-Anderson plaintiffs now ask the Court to also excuse their failure to file suit within ninety days of receiving their right to sue letters.

Federal Rule of Civil Procedure 15(c) provides for the relation back of certain amendments to the complaint to the date of the original pleading. Fed.R.Civ.P. 15(c). Read literally, the rule covers an amendment adding a new "claim or defense" or an amendment which "changes the party or the naming of the party against whom a claim is asserted." While the rule deals expressly only with amendments changing or adding defendants, courts have found that the rule is also intended to apply to amendments substituting or adding plaintiffs. E.g., Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1308 (D.C.Cir. 1982); Newell v. Harrison, 779 F.Supp. 388, 390-91 (E.D.La. 1991) ("A majority of federal courts hold that an amendment adding plaintiffs who assert the same claim . . . may relate back."); Stoppelman v. Owens, 580 F.Supp. 944, 946 (D.D.C. 1983); Mattson v. Cuyuna Ore Co., 24 F.R.D. 363 (D.Minn. 1959). The central underlying question which the Court must decide to determine whether the non-Anderson plaintiffs should relate back to the time of Anderson's pro se filing is whether the defendant had notice of the potentially numerous claims at the time Anderson's action was commenced and whether

relation back would cause defendant undue prejudice. Paskuly v. Marshall Field & Co., 494 F.Supp. 687, 688 (N.D. Ill. 1980), aff'd, 646 F.2d 1211 (7th Cir.), cert. denied, 454 U.S. 863 (1981). Defendant clearly had some notice of these claims. All but one of the plaintiffs filed administrative charges, and plaintiff's first amended complaint stated an intention to make claims on behalf of similarly situated individuals. The focus of the analysis then shifts to whether allowing the non-Anderson claims to proceed would cause defendant undue prejudice.

The Court finds that defendant would be significantly prejudiced if any of the non-Anderson plaintiffs (except Nielsen) are allowed a second bite at the apple. Although the fact that the amendment exposes defendant to greater damages is not sufficient prejudice to deny relation back, Charles Wright, Arthur Miller & Mary Kay Kane, 6A Federal Practice and Procedure § 1501 at 162 (1990), the general purposes of the statute of limitations would be frustrated by allowing relation back. Statutes of limitations are "intended to secure repose for defendants -- to let them go about their business, after a definite time, untroubled by fear of being sued." Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990). There is no evidence that the failure of the non-Anderson plaintiffs who filed their own administrative charges to file suit within the limitations period was due to any mistake or inadvertence, or any action by defendant. Defendant emphasizes the fact that five of the non-Anderson plaintiffs received right to sue letters and deliberately decided not to file lawsuits after receiving legal advice. The Court finds this argument persuasive. See United States v. Xubrick, 444 U.S. 111, 123 (1979) ("A plaintiff . . . armed with the facts about the harm done to him, can protect

himself by seeking advice in the medical and legal community."); Manildra Milling Corp. v. Ogilvie Mills, Inc., 746 F.Supp. 40, 42 (D.Kan. 1990) (no relation back against a new defendant because plaintiff made a "conscious decision" to leave that defendant out of the original complaint). Under all the circumstances, the Court can only conclude that the non-Anderson plaintiffs (except Nielsen) made a deliberate and considered decision not to proceed and to allow the statute of limitations to run. Accordingly, the Court will dismiss all of the non-Anderson plaintiffs, except Nielsen. While this conclusion may seem harsh, the application of the statute of limitations is almost always harsh. Courts have nevertheless consistently respected legislative policy decisions as to when a claim becomes stale. Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

2. MHRA

The Court has already concluded that it would cause defendant undue prejudice to allow the non-Anderson plaintiffs, except Nielsen, to relate their ADEA claims back to the date that Anderson filed his original complaint. The same reasoning applies to the MHRA claims. However, with respect to Anderson's and Nielsen's MHRA claims, an additional statute of limitations issue arises. Anderson filed his complaint on February 10, 1992, but did not serve defendant until June 1992. A person must bring a civil action within forty-five days of receiving a right to sue letter from the MDHR. Minn. Stat. § 363.14. Under Federal Rule of Civil Procedure 3, an action is commenced by filing a complaint. Under Minnesota Rule of Civil Procedure 3.01, an action is commenced upon service of process. The parties

agree that if the Federal Rule governs Anderson's MHRA claim was timely; if the Minnesota Rule applies, his claim is time-barred.

The Court concludes that Minnesota Rule 3.01 applies and Anderson's MHRA claim time-barred. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court held that in diversity cases, if state law requires service to commence an action, state law, and not Federal Rule 3, governs for purposes of state statute of limitations. "The only difference between this case and Walker is that here, the Plaintiffs allege both state and federal causes of action, whereas Walker was based on claims under state law and jurisdiction thus was premised solely on diversity of citizenship." Appletree Square 1 Ltd. v. W. R. Grace & Co., 815 F.Supp. 1266, 1272 (D.Minn. 1993). There is no logical reason to make a distinction on this basis. Id. The Court finds that state law rules apply. Concordia College Corp. v. W. R. Grace & Co., 999 F.2d 326, 330-31 (8th Cir. 1993); Witherspoon v. Roadway Express, Inc., 782 F.Supp. 567 (D.Kan. 1992) (state law discrimination claim dismissed as untimely but Title VII claim not dismissed). Because Anderson did not serve defendant until June 9, 1993, under Minnesota law his action under the MHRA was not commenced within forty-five days of receipt of the right to sue notice and that claim is time barred. Thus, Anderson's MHRA claim is untimely and Nelson may not relate his claim back to it.

B. Minn. Stat. § 181.81

Minn. Stat. § 181.81 forbids private sector employers from adopting mandatory retirement policies for employees

under the age of seventy. The statute of limitations for a claim under section 181.81 is two years. Kyllo v. Farmers Cooperative of Wanamingo Minnesota, 723 F.Supp. 1332, 1337 (D.Minn. 1989); Minn. Stat. § 541.07(5). Defendant argues that these claims are barred by the statute of limitations. Plaintiffs offer two arguments. First, plaintiffs argue that the this cause of action relates back to the time the original complaint was filed and thus is timely. Second, plaintiffs argue that the Court should find that the two-year statute of limitations was equitably tolled.

The statute of limitations on Anderson's section 181.81 claim expired on April 2, 1992. Anderson filed his original complaint in February 1992 but did not serve defendant until June 1992. For the reasons stated above about commencement of a state cause of action for statute of limitations purposes, the Court finds that Anderson's section 181.81 claims is time barred. Moreover, plaintiffs offer no facts in support of equitable tolling. Thus, these claims will be dismissed.

II. Motions to Bifurcate Stay Discovery, and Extend Pretrial Schedule

Defendant seeks a bifurcation of the issues for trial. Defendant argues that the issue of whether Anderson's need to file a timely administrative claim with the EEOC was equitably tolled should be answered, by a fact finder first. The Court may order a separate trial on any issue if a separate trial will be conducive to expedition and economy. Fed.R.Civ.P. 42(b). The Court has broad discretion on whether to order a separate trial on a particular issue. Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 541 (8th Cir.

1977). "In exercising discretion, district courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion." O'Dell v. Hercules, Inc., 904 F.2d 1194, 1202 (8th Cir.1990). After weighing these factors, the Court has decided against bifurcation. Thus, defendant's motion will be denied.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. defendant's motion to dismiss Robert Eggan, Carl Englehorn, Peter Lowry, Timothy Wandersee, and Donald Woods is granted;

2. all state law claims are dismissed as barred by the statute of limitations; and

3. defendant's motion to bifurcate the issues for trial, stay discovery, and extend the pretrial schedule is denied.

Judge Harry H. MacLaughlin
United States District Court

DATED: April ____, 1995

(2)

95-95

No. 94-1363

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

UNISYS CORPORATION, doing business as REMINGTON RAND UNIVAC, doing business as SPERRY UNIVAC, doing business as SPERRY, doing business as UNISYS, doing business as PARAMAX SYSTEMS,

Petitioner,

vs.

RICHARD ANDERSON; ROBERT EGGAN; CARL ENGLEHORN; NORRIS NIELSEN; TIMOTHY WANDERSEE; DONALD WOODS; PETER LOWRY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner has sought a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals reversing the United States District Court for the District of Minnesota's entry of summary judgment for Petitioner.

Petitioner's phrasing of the two questions Petitioner desires to present is argumentative and inaccurate. Petitioner's two stated questions also contain a subsidiary but very significant third question.

A clear rendition of Petitioner's first question is:

1. Do ambiguous and misleading written representations by the Equal Opportunity Employment Agency ("EEOC") concerning the administrative charge-filing period of the Age Discrimination in Employment Act ("ADEA") to a pro se claimant equitable toll the administrative charge-filing period of the ADEA?

A clear rendition of Petitioner's second question is:

2. Is it an unconstitutional usurpation of federal power to allow ambiguous and misleading written representations by a state agency, the Minnesota Department of Human Rights ("MDHR"), on the federal ADEA administrative charge-filing period to result in the tolling of that charge-filing period, if the representations were made by the MDHR while acting pursuant to its role under Federal Law as an agent for the EEOC, when similar ambiguous and misleading written representations made directly by the EEOC would result in tolling?

Petitioner raises a third question, in the apparent hope that if review is granted, and Petitioner does obtain a reversal on one or both of the two prior questions, Respondents' claims might be entirely dismissed by the Court. This third question is:

> 3. Did the district court properly reach its summary judgment decision holding as a matter of law that Petitioner complied with the ADEA notice provisions?

Respondents have filed an associated cross-petition for a writ of certiorari.

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II. Applying the same equitable tolling principles that apply to the EEOC to state human rights agencies that are legally authorized agents of the EEOC does not raise the constitutional issue of state usurpation of federal power. 18

III. The district court's ruling – (1) allowing Petitioner to withdraw its prior admission that Respondent Anderson's charge was timely; (2) granting Petitioner's request to make a second summary judgment motion on Petitioner's compliance with ADEA notice provisions after the dispositive motion deadline had expired; (3) permitting Petitioner to use surprise evidence to support its summary judgment motion, that had not been disclosed to Respondents prior to the expiration of the discovery deadline; (4) ordering Respondents to respond in 5 days to Petitioner's summary judgment motion instead of the 19 days as required under the local practice rules; (5) failing to

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schedule a hearing on the second summary judgment motion; (6) refusing to reopen discovery in light of Petitioner's surprise evidence; (7) issuing a summary judgment order based on the surprise evidence and despite previously submitted, contradictory evidence that had not been discredited – so drastically and seriously departed from the accepted and usual course of judicial procedure: and the Courts of Appeals' failure to rule on this departure: call for the exercise of the Court's power of supervision. 20

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No. 94-1363

In The

Supreme Court of the United States

October Term, 1994

UNISYS CORPORATION, doing business as REMINGTON RAND UNIVAC, doing business as SPERRY UNIVAC, doing business as SPERRY, doing business as UNISYS, doing business as PARAMAX SYSTEMS,

Petitioner,

vs.

RICHARD ANDERSON; ROBERT EGGAN; CARL ENGLEHORN; NORRIS NIELSEN; TIMOTHY WANDERSEE; DONALD WOODS; PETER LOWRY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion on which Petitioner seeks review is the Eighth Circuit Court of Appeals' decision reversing the district court's December 28, 1993 summary judgment order and affirming the

district court's October 20, 1993, order. The decision was issued on February 14, 1995, is reported at 47 F.3d 302 and reprinted in the Appendix to Petitioner's Writ at A, 5-22. The Eighth Circuit on April 19, 1995 denied the non-Anderson/Nielsen Respondents' motion for rehearing. The April 19, 1995 order is unreported and reprinted in the Appendix ("A") to Petitioner's Writ at A, 1-4.

The opinion of the district court holding that there was evidence that Petitioner failed to comply with ADEA notice provisions and allowing the joinder of additional Plaintiffs in this action was issued on March 25, 1993. It is unreported and reprinted in the Appendix ("B") to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari at B, 4a-21a. The opinion of the district court granting Petitioner's motion to dismiss the federal claims of the non-Anderson/Nielsen Respondents and the state claims of all of the Respondents was issued on October 20, 1993. It is unreported and reprinted in the Appendix to Petitioner's Writ at A, 47-60. The opinion of the district court denying Respondents' motion to reconsider the dismissal of the non-Anderson/Nielsen Respondents was issued on November 24, 1993. It is unreported and reprinted in the Appendix ("A") to Respondents' Writ at A, 1a-2a. The district court's denial of Petitioner's first motion for summary judgment is attached in the Appendix to Respondents' Brief in Opposition to a Writ of Certiorari at C, 22a-23a. The district court's opinion granting Petitioner's second motion for summary judgment and holding that there was no evidence that Petitioner had failed to comply with ADEA notice provisions was issued on December 28, 1993. It is unreported and reprinted in the Appendix to Petitioner's Writ at A, 23-46.

The pretrial schedule order of the district court establishing that all discovery shall terminate on October 1, 1993, that all dispositive motions shall be filed and the hearing thereon

completed prior to December 1, 1993, and that all dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b), was issued on September 14, 1992. It is reprinted in the Appendix to Respondents' Brief in Opposition to the Petition for a Writ at A, 1a-3a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is appropriate under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 2101(c), the writ must be applied for within ninety days after the entry of judgment or decree. The 90 day period commences from the date of a denial of a petition for rehearing. The non-Anderson/Nielsen Respondents' petition for a rehearing was denied on April 19, 1995. The 90 day period expired on July 19, 1995.

RELEVANT STATUTES, REGULATIONS AND RULES INVOLVED

29 U.S.C. § 626(d):

> No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed —
>
> * * *
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 627:

> Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

29 U.S.C. § 633:

> (a) Nothing in this Act shall effect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant and seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such

> proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subjection at the time such statement is sent by registered mail to the appropriate State authority.

29 C.F.R. § 1626.9:

> (a) The Commission may refer all charges to any appropriate State agency and will encourage State agencies to refer charges to the Commission in order to assure that the prerequisites for private law suit, as set out in section 14(b) of the Act, are met. Charges so referred shall be deemed to have been filed with the Commission in accordance with the specifications contained in sec. 1626.7(b). * * *
>
> (b) States to which all ADEA charges may be referred: * * * Minnesota * * *.

29 C.F.R. § 1627.10:

> Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its

> authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

Minn. Stat. § 363.03 subd. 1:

> * * * it is unfair employment practice . . . For an employer, because of * * * age,
>
> > (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
> >
> > (b) to discharge an employee; or
> >
> > (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Minn. Stat. § 363.06 subd. 3:

> A claim of an unfair discriminatory practice must be brought as a civil action * * * or filed in a charge with the commissioner within one year after the occurrence of the practice. * * *

Fed. R. Civ. P. Rule 56(c):

> The motion shall be served at least 10 days before the time fixed for a hearing.

Local Rules of the United States District Court for the District of Minnesota L.R. 7.1:

> (b) Dispositive Motions:
>
> > (1) No motion shall be heard by a district judge unless the moving party delivers one copy of the following documents to opposing counsel * * * at least 28 days prior to the hearing: * * *
> >
> > (D) Affidavits and Exhibits
> >
> > (E) Memorandum of Law
> >
> > * * *
> >
> > (2) Any party responding to the motion shall deliver one copy of the following documents to opposing counsel * * * at least 9 days prior to the hearing:
> >
> > (A) Memorandum of Law
> >
> > (B) Affidavits and Exhibits.

STATEMENT OF THE CASE

Contained in the two questions Petitioner presents for review is Petitioner's assertion that it has complied with the ADEA's notice provisions and it has committed no misconduct. Respondents request that this subsidiary question, clearly included in Petitioner's two principle questions, be raised with and reviewed by the Court.

In the 18 months from June of 1992, when Petitioner was first served with discovery from Respondents, to December 14, 1993, Petitioner never disclosed any evidence showing that it had posted the required ADEA notice at the facility in which most of the Respondents had worked. Only after the expiration of both the discovery and dispositive motion deadlines and after Petitioner had already lost a summary judgment motion on the ADEA notice issue, did Petitioner produce critical and surprising evidence purporting to show an ADEA posting at Respondents' place of work. The district court permitted Petitioner to make a second summary judgment motion on the same issue, violating the scheduling order previously issued in the action because the dispositive motion deadline had passed. The district court then gave Respondents only 5 days to respond, instead of the 19 days the local practice rules provide to parties responding to summary judgment motions. One week later, without a hearing, on December 28, 1993 the district court entered summary judgment against the Respondents, in spite of long standing and substantial evidence that showed Petitioner had not complied with ADEA notice provisions, some of which had been in the district court's file for one year. These actions by the district court were a drastic and serious departure from the accepted and usual course of judicial proceedings and warrant review.

Respondents oppose Petitioner's request that the question, whether ambiguous and misleading representations by agents of the EEOC toll the charge filing period, be reviewed. Petitioner has made several misstatements on this issue in its Petition. The Minnesota Department of Human Rights' ("MDHR") representations on the ADEA's charge filing deadline to Respondent Anderson were not, as Petitioner claims, "accurate but incomplete." Instead, as the Eighth Circuit states, the representations were "ambiguous and misleading." The MDHR did not tell Respondent Anderson, as Petitioner incorrectly implies in its Statement of the Case, that the Minnesota statute's

charge filing period was one year. Rather, the MDHR did not indicate whether the one year charge filing period disclosed to Respondent Anderson was the state filing period, the federal filing period, or the filing period under both federal and state law. Petitioner's allegation, that the Eighth Circuit's decision to equitably toll the ADEA charge filing period is in direct conflict with the decisions of the other Circuits, is incorrect.

Respondents have filed an associated cross petition for a writ of certiorari.

FACTUAL BACKGROUND

A. Involuntary Terminations

All seven Respondents were employed for many years by Petitioner in its Software Engineering Department. They were all selected for termination at the same management meeting and were not discharged in two distinct layoffs, as Petitioner incorrectly claims. Six were told they were laid off on April 2, 1990. Petitioner delayed informing the seventh Respondent of his discharge, Donald Woods, until June 18, 1990.

Petitioner initially misled Respondents by claiming Respondents were being laid off in a "reduction in force." Evidence uncovered through discovery shows that the number of employees and contract workers in the Software Engineering Department actually increased following this alleged "reduction in force."

B. Administrative Proceedings

Respondent Anderson is the lead Plaintiff in this action. He filed a pro se administrative charge and subsequently commenced this action by filing a pro se Complaint. If his

administrative charge is viable, other Respondents should be able to "piggyback" on his filing. *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986).

In the fall of 1990 Respondent Anderson contacted the Minnesota Department of Human Rights ("MDHR"). The MDHR informed Respondent Anderson, in writing, that if his charge alleged a violation of federal law, it would notify the Equal Employment Opportunity Commission (EEOC) for him. The MDHR is a deferral agency under federal law and has a working relationship with the EEOC.

The MDHR, in writing, also told Respondent Anderson that the charge filing period was one year, without indicating whether this period was for state claims, federal claims, or both. Respondent Anderson did not know that the one year period was for state law claims only, and that the ADEA filing period was shorter and only 300 days. Petitioner's claim, made for the first time in its current petition, that there is no evidence that Respondent Anderson relied on the MDHR's misleading representation, is incorrect.

Supposedly, federal procedures governing administrative charges of discrimination are designed to enable claimants to represent themselves, and that is what Respondent Anderson proceeded to do for the next year. From the time of his layoff in April of 1990 until June of 1992, when Respondent Anderson contacted the below identified Counsel of Record, Respondent Anderson was not represented by an attorney. Petitioner's claim on page 7 of its Petition, that Respondent Anderson consulted with Attorney O'Brien after his administrative charge was dismissed, is false. Petitioner's implication, on page 6 of its Petition, that Respondent Anderson, like the rest of the filing Respondents, consulted with Attorney O'Brien on charge filing procedures, is incorrect. Respondent Anderson was relying on the MDHR's representations on the charge filing period.

As a result, when Respondent Anderson, on March 25, 1991, filed a pro se administrative charge with the MDHR, he thought he was complying with the only applicable filing period. Though Respondent Anderson had filed within the state administrative filing limitations period, Minn. Stat. § 363.06, subd. 3, he had not filed within the federal administrative filing period, 29 U.S.C. § 626(d).

Age discrimination charges were also filed by Respondents Eggan, Englehorn, Lowry, Wandersee and Woods.

Petitioner, in its defense to the administrative charges, repeated the misrepresentation that Respondents were discharged in a "reduction of force". The MDHR subsequently dismissed the claims of the six Respondents who had filed administrative charges.

C. Commencement of the Action

On February 10, 1992, Respondent Anderson filed a pro se Complaint in federal court. Contrary to Petitioner's suggestions, this Complaint did allege that the layoff which included Respondent Anderson disproportionately impacted Petitioner's older workers and that Petitioner had discriminated against him as well as other older workers because of their age.

The pro se Complaint was not immediately served. It was Respondent Anderson's understanding that the commencement date of both his federal and state claims would be the filing date as long as the pro se Complaint was served within 120 days of its filing, in compliance with Federal Rules of Civil Procedure 3 and 4(m). The district court did not share the same understanding and later held that the State Procedural Rule, which provides that an action is commenced only upon service, and not upon filing, determined the commencement time for the state claims. In the

119 days between filing and service, the district court held that the limitations statute on the state law claims had run. As a result, the state law claims of all of the Respondents were dismissed.

Respondent Anderson eventually retained an attorney and, shortly thereafter, filed in June of 1992 an Amended Complaint. The Amended Complaint alleged that the administrative charge had been timely filed. It also specifically stated that Respondent Anderson intended to seek certification for a class action. Both the Amended Complaint and the pro se Complaint were served on Petitioner on June 9, 1992.

It would still be another six months before Respondent Anderson learned that Petitioner would make an issue out of the alleged untimeliness of Respondent Anderson's administrative filing. For example, in its July 10, 1992 Answer to Respondent Anderson's Amended Complaint, Petitioner specifically admitted that Respondent Anderson's administrative charge was timely. Petitioner also failed to assert as a defense in its Statement of the Case 1 1/2 months later a claim that Respondent Anderson's administrative charge was untimely.

D. Motion for Class Certification; Timeliness Issue Raised by Petitioner for the First Time; No Evidence of Posting at Respondent Anderson's Facility

On December 9, 1992, Respondent Anderson moved the court to certify a class consisting of employees of Petitioner's Software Engineering Department who were terminated in 1990. In its response to this motion Petitioner, for the first time, raised as an issue the timeliness of Respondent Anderson's administrative charge. Petitioner claimed that because Respondent Anderson's administrative charge was defective, no additional putative Plaintiffs could piggyback on it.

Respondent Anderson argued that there were several reasons why tolling of the charge filing period was justified. The district court rejected all but one of them, including the argument that tolling was justified because of the misleading statements on the charge filing period by the MDHR.

The district court did find that there was evidence to justify tolling on one basis, however. Respondent Anderson had never seen a proper ADEA notice at the building he had worked at prior to his departure. He did not know when he was discharged that he was old enough to be protected under the age discrimination laws. He filed an affidavit in which he testified that Petitioner had not posted in his building the legally required notice on the ADEA. Prior to this motion, Petitioner had not disclosed any evidence of a posting at Respondent Anderson's facility, nor did Petitioner produce any evidence in connection with this motion contradicting Respondent Anderson's affidavit.

On March 25, 1993, the district court ruled that there was evidence showing that Petitioner had failed to comply with ADEA notice provisions, held that a failure to post would toll the ADEA administrative charge filing period, and concluded that Respondent Anderson had evidence that could establish his charge was timely. The district court denied Respondent Anderson's request for class certification on the grounds that the requested class was not sufficiently numerous, but ruled the additional Respondents could piggyback on Respondent Anderson's claim and join this action. The five Respondents who had filed administrative charges, along with Respondent Nielsen, who had not, joined the action in June of 1993.

E. Motion to Dismiss the Non-Anderson/Nielsen Respondents

On July 28, 1993 Petitioner moved for the dismissal of the

non-Anderson/Nielsen Respondents. The district court granted this motion on October 20, 1993, but did not enter an appealable judgment or order. Petitioner did not move for the dismissal of the ADEA claims of Respondents Anderson and Nielsen at this time.

F. Summary Judgment Motions on the ADEA Posting Issue

When the discovery period expired on October 1, 1993, Petitioner still had not produced any evidence in response to Respondents' discovery indicating there had been an ADEA posting at Respondent Anderson's place of work. Nonetheless, Petitioner made two motions requesting summary judgment on the posting issue anyway.

Petitioner's first motion was formally made on September 28, 1993, only three days before the discovery period expired and without the motion's supporting exhibits and evidence. When the supporting materials were delivered, Petitioner conceded it had no evidence of an ADEA posting at Respondent Anderson's facility. Instead, Petitioner disclosed, for the first time, specific details of an alleged ADEA posting in a human resources office in another building, several miles away, and argued that this posting was legally sufficient. However, Respondent Anderson had visited a human resource office only 8 or 10 times in his 25 years with Petitioner. In response to this motion, Respondents also submitted additional material confirming Respondent Anderson's affidavit, submitted 11 months earlier, that there had not been an ADEA posting at Respondent Anderson's place of work. The district court denied Petitioner's first summary judgment motion on December 1, 1993. The same day the dispositive motion deadline expired.

On December 14, 1993, well after both the discovery and dispositive motion deadlines had expired, Petitioner made a second summary judgment motion on the identical issue.

Petitioner was now claiming there was an ADEA posting at Respondent Anderson's building. The affidavits of four previously undisclosed witnesses were submitted in support. In nearly identical language, all four witnesses expressed absolute certainty that there had been a proper ADEA posting at Respondent Anderson's facility. They had been guards who had worked only 1 out of every 7 or so weeks at Respondent Anderson's building over three years earlier.

Even though the local rules of the district court require that summary judgment motions had to be served upon an opposing party 28 days in advance of a hearing, and that the opposing party had up to 9 days prior to the hearing to respond, on December 15, 1993, the district court orally ordered Respondents to reply within 5 days. On December 28, 1993, without a hearing, the district court granted a summary judgment against all of the Respondents. In an order dated January 7, 1994, the district court denied Respondents' motion to reconsider.

The Respondents timely appealed the district court's judgment to the Eighth Circuit Court of Appeals.

Essentially, three general issues were raised in the appeal — whether Respondent Anderson's administrative filing was timely; whether Respondent Anderson commenced the action before the litigation limitations period on the state claims had lapsed; and whether the non-Anderson/Nielsen Respondents could piggyback their ADEA claims onto the ADEA claims of Respondent Anderson. The first of these three general issues is addressed in this brief. The last of these three general issues is addressed in Respondents' Cross Petition for a Writ of Certiorari.

In its February 14, 1995, decision, the Eighth Court of Appeals partially reversed the district court and restored the ADEA claims of two of the Respondents, Richard Anderson and

Norris Nielsen. The Court of Appeals held that the MDHR's representations on the administrative charge filing period had misled Respondent Anderson, that the 300 day ADEA filing period was tolled, and that Respondent Anderson's administrative charge was timely. The Respondents had argued to the Court of Appeals that tolling of the ADEA charge filing period was justified on other grounds as well, including Petitioner's failure to comply with ADEA notice provisions, and that Respondent Anderson's charge was timely under the continuing violation doctrine, but the Court of Appeals concluded it did not have to address these other arguments, given that it had already found Anderson's charge was timely.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION, THAT AMBIGUOUS AND MISLEADING WRITTEN REPRESENTATIONS BY THE EEOC TO A PRO SE CLAIMANT TOLL THE ADEA ADMINISTRATIVE CHARGE FILING PERIOD, IS CONSISTENT AND NOT IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS; THERE IS NO COMPELLING NEED TO REVIEW THIS ISSUE.

Petitioner asks that this question be reviewed to resolve an alleged difference on the issue among the Circuits. A review of this issue, however, is not justified on these grounds.

Simply put, Petitioner's alleged conflict among the Circuits does not exist. Petitioner incorrectly creates the appearance of a conflict by mischaracterizing the Minnesota Department of Human Rights' representations to Respondent Anderson.

The Eighth Circuit correctly characterized the MDHR's language as "ambiguous and misleading" in its opinion A-15. Petitioner's assertion that the communication was "accurate but incomplete" ignores the Eighth Circuit's actual holding and allows Petitioner to compare apples with oranges in its case law analysis.

For example, contrary to Petitioner's claim, there is no conflict between the Tenth Circuit and the Eighth Circuit on this issue. The Tenth Circuit has also adopted the principle that "ambiguous and misleading" written statements by the EEOC justify tolling if they were made to an unrepresented claimant. *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984). That Martinez continues to be good law in the Tenth Circuit was confirmed in *Scheerer v. Rose State College*, 950 F. 2d 661, 665 (10th Cir. 1991).

In *Long v. Frank*, 22 F.3d 54 (2d Cir. 1994) the statement in question was uncertain – ***but it was not misleading*** because the EEOC's uncertainty stemmed from inconsistent case law. The EEOC was informing, accurately, the claimant in *Long* that the law was uncertain, and capitalized the word "may" to emphasize that uncertainty.

The holding in *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992) does not conflict with the Eighth Circuit's decision for another reason — the communication in question was oral and not in writing. The Court in *Conaway* made it clear that the oral nature of the alleged communication was the significant factor in the outcome.

> The EEOC undoubtedly engages in numerous telephone calls every day. It would be virtually impossible for the EEOC or a defendant to rebut a plaintiff's unsupported

> allegation that the EEOC provided incomplete information in a telephone conversation. Allowing a plaintiff equitably to toll a time limitation based on incomplete information provided in a telephone conversation would create a great potential for abuse.

955 F.2d at 363.

Finally, in *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748 (3rd Cir. 1983) the key fact was that the allegedly misled claimant had retained an attorney.

II.

APPLYING THE SAME EQUITABLE TOLLING PRINCIPLES THAT APPLY TO THE EEOC TO STATE HUMAN RIGHTS AGENCIES THAT ARE LEGALLY AUTHORIZED AGENTS OF THE EEOC DOES NOT RAISE THE CONSTITUTIONAL ISSUE OF STATE USURPATION OF FEDERAL POWER.

Petitioner argues that the Eighth Circuit's decision allows State officials to "alter" federal statutes of limitations and unconstitutionally usurp federal power.

There is no constitutional issue here. Petitioner is ignoring the fact that any ability the MDHR has to "alter" (in reality toll) the ADEA statute of limitations, if it misleads claimants on the limitations period, is only a result of power and responsibilities that have been freely and gladly delegated to it by the Federal Government. No usurpation has taken place.

Federal law encourages states to adopt and enforce age

discrimination laws, and tries to delegate to the states the EEOC's role of promoting fair employment practices. States that do so are called "deferral states." 29 U.S.C. § 633. In deferral states, ADEA claimants must invoke state proceedings if they wish to preserve their federal claims. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979).

Minnesota is an ADEA deferral state. 29 C.F.R. § 1626.9. When Respondent Anderson's administrative charge was being investigated, the MDHR was in effect acting as the EEOC's representative.

III.

THE DISTRICT COURT'S RULINGS – (1) ALLOWING PETITIONER TO WITHDRAW ITS PRIOR ADMISSION THAT RESPONDENT ANDERSON'S CHARGE WAS TIMELY; (2) GRANTING PETITIONER'S REQUEST TO MAKE A SECOND SUMMARY JUDGMENT MOTION ON PETITIONER'S COMPLIANCE WITH ADEA NOTICE PROVISIONS AFTER THE DISPOSITIVE MOTION DEADLINE HAD EXPIRED; (3) PERMITTING PETITIONER TO USE SURPRISE EVIDENCE TO SUPPORT ITS SUMMARY JUDGMENT MOTION, THAT HAD NOT BEEN DISCLOSED TO RESPONDENTS PRIOR TO THE EXPIRATION OF THE DISCOVERY DEADLINE; (4) ORDERING RESPONDENTS TO RESPOND IN 5 DAYS TO PETITIONER'S SUMMARY JUDGMENT MOTION INSTEAD OF THE 19 DAYS AS REQUIRED UNDER THE LOCAL PRACTICE RULES; (5) FAILING TO SCHEDULE A HEARING ON THE SECOND SUMMARY JUDGMENT MOTION; (6) REFUSING TO REOPEN DISCOVERY IN LIGHT OF PETITIONER'S SURPRISE EVIDENCE; (7) ISSUING A SUMMARY JUDGMENT ORDER BASED ON THE SURPRISE EVIDENCE AND DESPITE PREVIOUSLY SUBMITTED, CONTRADICTORY EVIDENCE THAT HAD NOT BEEN DISCREDITED — SO DRASTICALLY AND SERIOUSLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE: AND THE COURT OF APPEALS' FAILURE TO RULE ON THIS DEPARTURE: CALL FOR THE EXERCISE OF THE COURT'S POWER OF SUPERVISION.

Both in the questions Petitioner contends this case presents, and in its arguments supporting its request for a review of these questions, Petitioner claims it complied with the ADEA's notice provisions. The district court granted Petitioner's second

summary judgment motion on this issue, but it was based on suspicious evidence and the circumstances leading up to the order are disturbing. The circumstances of and the evidence relied upon by the district court were brought to the attention of the Eighth Circuit, but the Eighth Circuit did not address this issue.

29 U.S.C § 627 requires employers to post and keep posted in conspicuous places upon their premises an ADEA notice prepared or approved by the EEOC. 29 C.F.R. § 1627.10 adds that the notice must be posted in "*prominent* and *accessible* place*s* where it can be *readily* observed by employees (and) *applicants* for employment * * *." (emphasis added).

Well established law in all of the circuits holds, and Petitioner does not contest, that an employer's failure to post the required notice can toll the administrative charge filing period. *DeBrunner v. Midway Equipment Co.*, 803 F.2d 950 (8th Cir. 1986).

Petitioner's previous and numerous interrogatory answers, signed under oath, gave absolutely no indication there was a posting at Respondents' place of work. The surprising testimony from the 4 guards contradicted these prior discovery responses. Their affidavit testimony, submitted in a summary judgment proceeding and contrary to Petitioner's earlier sworn discovery responses, should have been ignored by the district court. *Camfield Tires, Inc. v. Michelin Tire Company*, 719 F.2d 1361 (8th Cir. 1983); *Van T. Junkins and Associates Inc. v. U.S. Industries, Inc.*, 736 F.2d 656 (11th Cir. 1984).

Even on July 28, 1993, when Petitioner moved for a bifurcated hearing on the ADEA posting issue, Petitioner submitted no evidence indicating that it had posted an ADEA notice at Respondent Anderson's place of work.

Serious procedural irregularities proceeded the summary judgment order.

The district court violated a prior court order by permitting Petitioner to make its December 14, 1993 summary judgment motion and by allowing the surprising evidence to be submitted. A September 14, 1992 order establishing the pretrial schedule stated that discovery would terminate on October 1, 1993. The same order also held that all motions for summary judgment had to be made *and* heard on or before December 1, 1993.

The district court did not display a similar procedural indulgence towards Respondents. The day after Petitioner made its motion, Respondents received a verbal order from the district court to respond within five days. Respondents were entitled to 19 days under the local rules. Local Rules for United States District Court for the District of Minnesota, Rule 7.1(b). Additionally, Respondents' request that the discovery period be reopened, because of Petitioner's new evidence, was denied.

Serious departures from substantive fairness also occurred.

Summary judgment is not appropriate if there is a genuine factual conflict. *AgriStor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987).

The district court had in the past acknowledged the existence of evidence contradicting Petitioner's. On two occasions before its December 28, 1993 summary judgment order holding that Respondents had no evidence contesting Petitioner's new and surprising evidence, the district court had specifically ruled there was evidence that Petitioner had failed to post. The first time was in its March 25, 1993 order allowing the joinder of additional Plaintiffs. In its December 1, 1993, denial of Petitioner's first request for summary judgment, the district court explicitly held that there was evidence that Petitioner failed to comply with ADEA notice provisions.

Moreover, there was absolutely no indication that Respondent's evidence had suddenly and massively been discredited. Respondent Anderson had consistently, over a period close to one year, testified that he had regularly looked at the bulletin boards in his place of work, that he never saw a posting in conformance with the ADEA *and* that such notice was *not* posted. (His second affidavit was dated December 31, 1992; his third affidavit was dated August 11, 1993; his deposition was taken on August 12 and 13 of 1993; and his fourth affidavit was dated November 22, 1993). Current employees of Petitioner also confirmed there was not a conspicuous and prominent ADEA posting at the complex where most of the Respondents had worked.

CONCLUSION

Due to serious and drastic departures from the accepted and usual course of judicial procedure, and the Eighth Circuit Court of Appeals' failure to address these significant departures, Respondents request that the district court's treatment of the issue of whether Petitioner complied with ADEA notice provisions be reviewed.

Respectfully submitted,

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APPENDIX A — PRETRIAL SCHEDULE OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION DATED SEPTEMBER 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-92-138

Richard Anderson,

Plaintiff,

v.

Unisys Corporation,

Defendant.

PRETRIAL SCHEDULE

DOUGLAS P. KEMPF, Esq., KEMPF & KEMPF, for plaintiff.

THOMAS M. SIPKINS, Esq., POPHAM, HAIK, SCHNOBRICH & KAUFMAN, for defendant.

Pursuant to Rule 16, Federal Rules of Civil Procedure, and in order to secure the just, speedy, and inexpensive determination of this action, the following schedule shall govern these proceedings. The schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3.

1. The period during which the parties may conduct

discovery shall terminate on October 1, 1993. Disputes with regard to discovery shall be called immediately to the court's attention by the making of an appropriate motion, and shall not be relied upon by any party as a justification for not adhering to this pretrial schedule;

2. All motions which seek to amend the pleadings or add parties, including a class certification motion, must be filed and heard on or before February 1, 1993;

3. All other nondispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and served prior to October 1, 1993. All nondispositive motions shall be scheduled for hearing by calling Cathy Orlando, calendar clerk for the undersigned magistrate judge. All nondispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(a). A total of 15 minutes will be allotted to each party who appears to present argument on the motion. The moving party may reserve up to five of the 15 minutes for rebuttal. No discovery motion shall be heard unless the moving party files with the motion the statement required by Local Rule 37.1 and complies with the requirements of Local Rule 37.2;

4. That within the foregoing period allotted for discovery, but no later than July 1, 1993, plaintiff shall retain and disclose to opposing counsel all persons he intends to call as expert witnesses at trial. The disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. If interrogatories have been served which seek the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, plaintiff's answers to such interrogatories shall be fully supplemented and served on or before July 1, 1993;

Appendix A

5. That within the foregoing period allotted for discovery, but no later than August 1, 1993, defendant shall retain and disclose to opposing counsel all persons it intends to call as expert witnesses at trial. The disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. If interrogatories have been served which seek the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, defendant's answers to such interrogatories shall be fully supplemented and served on or before August 1, 1993;

6. All dispositive motions shall be filed and the hearing thereon completed prior to December 1, 1993. All dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b). Counsel should be forewarned that six to eight weeks advance notice is necessary to place a motion on Judge MacLaughlin's dispositive motion calendar;

7. This case shall be considered ready for trial on and after February 1, 1994.

DATED: Sept. 14, 1992.

s/ Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate Judge

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION FILED MARCH 25, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-138

Richard Anderson,

Plaintiff,

v.

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys, d/b/a Paramax Systems,

Defendant.

MEMORANDUM AND ORDER

Douglas P. Kempf, Kempf & Kempf, 205 Dupont Center, 9801 Dupont Avenue South, Bloomington, MN 55431, for plaintiff.

William R. Skallerud, Thomas M. Sipkins, Popham, Haik, Schnobrich & Kaufman, 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on plaintiff's motion for class certification in this action for age discrimination. Plaintiff's motion will be denied.

Appendix B

FACTS

Plaintiff Richard Anderson had been continuously employed by defendant Unisys Corporation and its predecessor companies from 1965 to 1990.[1] Plaintiff began in 1965 as a staff mathematician. On April 2, 1990, as part of a reduction in force, plaintiff was involuntarily laid off by the Software Engineering Department, a division of Unisys. At the time of his layoff plaintiff was forty-nine years old and held the title of Staff Consultant Development Engineer.

The circumstances surrounding the reduction in force are in dispute. Defendant admits that in late 1989 defendant's senior management instructed the Director of Software Engineering, Donna Kaspersen, to prepare for layoffs within her division. Def.'s Mem. Opp. Mot. Class Cert. at 3. Kaspersen directed the managers she supervised to prepare a ranking of employees based on skill level and the continued need for the job position. Kaspersen held a meeting of her managers on February 7, 1990 to review the rankings. Through discovery, plaintiff obtained handwritten notes that were taken at that meeting and which show stars or checks next to the names of all employees eventually laid off. Affidavit of Douglas P. Kempf Exh. 19. When the layoffs took place on April 2, 1990, fourteen employees within the Software Engineering Division were affected. Kempf Aff. Exh. 1. Twelve out of fourteen were over age forty. *Id.*[2] Plaintiff alleges

1. Unisys was formed by the merger of Burroughs Corporation and Sperry Corporation in 1986. Plaintiff had been employed by Sperry before the merger. Compl. ¶ 20.

2. Plaintiff claims that fifteen persons were laid off and thirteen of those people were more than forty years old. However, the evidence submitted by plaintiff shows only fourteen layoffs, twelve of which affected people over forty. Kempf Aff. Exh. 1.

that the notes from the February 7 meeting make clear that defendant expected the involuntary layoffs to have a disproportionate impact on older employees. Defendant states that in designating certain employees as layoff candidates no consideration was given to the employee's age and every effort was made to place the employees within other divisions of Unisys.

Plaintiff did not file an administrative claim within 300 days of his layoff, as required by the Age Discrimination in Employment Act (ADEA). Plaintiff contends that defendant never posted notice, as required by law, of rights protected by the ADEA. Plaintiff states that if such notice had been posted he would have seen it because after the layoff he regularly checked defendant's employee bulletin boards, at defendant's encouragement, in search for new position within the company. Second Affidavit of Richard Anderson ¶ 3. Plaintiff claims that because defendant did not post notice of his rights under the ADEA, he had only a general awareness of age discrimination laws. *Id.* ¶ 2. More specifically, plaintiff claims that he thought age discrimination laws only protected workers over fifty years old and, because he was forty-nine at the time of his layoff, he assumed he was not covered. *Id.*

Plaintiff asserts that he first became aware that defendant may have violated the ADEA during a conversation with Stephen Cooper of the Minnesota Department of Human Rights in the fall of 1990. *Id.* ¶ 5. In response to his conversation with Cooper, plaintiff requested information from the Human Rights Department. *Id.* The information provided by the department stated that "[y]ou have one year from the date of the action complained of to file a discrimination charge." *Id.* Exh. Plaintiff eventually filed a charge of age discrimination with the

Appendix B

Minnesota Department of Human Rights on March 25, 1991, which was within one year of his layoff. On September 25, 1991, the Minnesota Department of Human Rights dismissed the charges after concluding that the evidence was insufficient to indicate that defendant had a pattern and practice of terminating older employees in numbers disproportionate to their representation in the work force. Affidavit of Richard Anderson Exh. 7. On December 26, 1991, plaintiff formally requested that the department reconsider its conclusions, but the department refused.

Plaintiff filed a complaint, pro se, in federal district court on February 10, 1992 alleging age discrimination in violation of both federal and state law. Apparently plaintiff obtained legal representation after February 10, 1992, but before June 9, 1992, when plaintiff filed a amended complaint in which plaintiff claimed to represent a class of similarly-situated employees.

As evidence of discrimination, plaintiff offers the Court a detailed statistical analysis which he prepared, utilizing his skills as a mathematician, for the purposes of this motion. Plaintiff prepared the statistical analysis based on information obtained during discovery. The data offered by plaintiff includes fourteen pages of graphs and charts, and purports to establish that the probabilities are slim that the lay-offs were not related to age. More specifically, plaintiff claims that his statistical analysis establishes that the percentage of older workers laid off from his department, Software Engineering, were much greater than in any other department within the company.

Plaintiff also alleges that the layoffs in the Software Engineering Division did not comply with defendant's layoff policy. That policy states that part-time, temporary, and

subcontract employees should be laid off first. Kempf Aff. Exh. 20. If management choose to layoff a full-time employee before a part-time, temporary, or subcontract employee, management was required to provide written reasons for that choice. *Id.* Plaintiff alleges that only one out of four part-time employees were laid off, and no subcontractors were terminated. Plaintiff claims that defendant invented reasons for laying off particular full-time employees after the February 7, 1990 meeting, where plaintiff claims defendant decided who would be let go. Plaintiff also alleges that once an older employee was considered a candidate for layoff, supervisors were pressured to lower any subsequent performance ratings for that employee, thereby providing a justification for the layoff decision. *See* Kempf Aff. Exh. 27, 28.

Finally, plaintiff claims that defendant provided the Minnesota Department of Human Rights with misleading information which was relied upon in dismissing plaintiff's charge. Plaintiff alleges that the data supplied was misleading because it covered persons who left voluntarily as well as those who were forced to leave, included both exempt and non-exempt employees,[3] included several departments, and listed certain employees who had been laid off as still active. Plaintiff alleges that by providing misleading information defendant successfully obscured the nature of the lay-offs which occurred in the Software Engineering Division in April 1990.

Plaintiff requests that the Court certify a class action so that thirteen additional plaintiffs may join this lawsuit. Eleven of the thirteen were laid off at the same time as plaintiff. In regard to the other two potential plaintiffs, one was apparently laid off in June 1990, Kempf Aff. Exh. 30; Def.'s Mem. Opp. Mot. Class Cert. at

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3. As defined by the Fair Labor Standards Act.

5, and the other voluntarily left because he was allegedly given trivial work, his supervisory duties were taken away, and was moved to a smaller office. Kempf Aff. ¶ 36.

DISCUSSION

Plaintiff requests that the Court certify a class action for alleged violations of the ADEA. Three issues must be resolved. First, the Court must decide whether plaintiffs are procedurally barred from bringing a class action. Second, if plaintiffs are not procedurally barred, the Court needs to determine whether the putative plaintiffs are "similarly situated." Third, if the Court resolves these issues in plaintiff's favor, the Court must decide what type of notice to putative class members is appropriate.

I. *Timeliness of Administrative Filing*

Summary judgment is appropriate when a plaintiff fails to file an ADEA claim in a timely manner. *Kraemer v. University of Minnesota*, 752 F.Supp. 283, 285 (D.Minn.), *aff'd without opinion*, 915 F.2d 1579 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 680 (1991). "Persons seeking relief under the ADEA in states with laws prohibiting age discrimination in employment are required to file an administrative charge of discrimination with the proper state agency within three hundred days of the alleged unlawful practice as a prerequisite to bringing a civil action." *Kloos v. Carter-Day Co.*, 799 F.2d 397, 399 (8th Cir. 1986); *see also* 29 U.S.C. § 626(d)(2).[4] The administrative filing requirement serves two purposes. First, it gives the state agency an opportunity to eliminate unlawful practices through informal

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4. States with age discrimination laws are deemed "referral states." *Kloos*, 799 F.2d at 399. Minnesota is a referral state. *Id.*; 29 C.F.R. § 1626.9.

conciliation. *Ulvin v. Northwestern Nat. Life Ins. Co.*, 943 F.2d 862, 865 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 970 (1992). Second, it provides employers with formal notice of the charges being brought against them. *Id.* The party may commence a civil action sixty days after the administrative filing. 29 U.S.C. § 626(d).

A failure to comply with the 300-day filing requirement is not necessarily fatal. The 300-day period may be equitably tolled "when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands." *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 676 (1991). In other words, the Court should find that the 300-day period tolled if defendant engaged in some "positive misconduct" which prevented plaintiff from making a timely charge. *Id.* "Positive misconduct" includes concealment, misrepresentation, or failure to post a notice of rights as required by the ADEA. *Nielson v. Western Electric Co., Inc.*, 603 F.2d 741, 743 (8th Cir. 1979).

Defendant asserts that plaintiff's administrative charge was not timely because it was filed on March 25, 1991, more than 300 days after April 2, 1990, the date of plaintiff's termination. In addition, defendant argues that plaintiff has no legally cognizable excuse for missing the 300-day time limit. Defendant asserts that this fact disposes of the entire case.

Plaintiff admits that his administrative filing was not timely under the ADEA. Plaintiff argues, however, that the Court should find that the filing period was tolled for several reasons. First and most important, plaintiff argues that defendant did not provide plaintiff with adequate notice of his rights under the ADEA. Plaintiff assert that at the time of his layoff he had an incomplete understanding of the ADEA. More specifically, plaintiff contends

that he thought the ADEA only protected workers over fifty and he was forty-nine at the time of the layoff. Anderson Aff. ¶ 2. Second, plaintiff asserts that he contacted the Minnesota Department of Human Rights immediately after Stephen Cooper of that department advised him to file an administrative charge and that the documents the Human Rights Department sent to him informed him that he had one year under state law to file a charge, but made no reference to the 300-day deadline imposed by the ADEA. *Id.* ¶ 5-6. Plaintiff contends that the fact that no other employee filed an administrative charge within the 300-day period indicates that no one was adequately informed of their rights under the ADEA. Finally, plaintiff asserts that a finding that the 300-day period was tolled would not prejudice defendant. Defendant does not respond to each of plaintiff's arguments specifically, although defendant does claim that it posted notices of rights under anti-discrimination laws. Def.'s Answers to Pl.'s Interrogatories at 7.

The only legally adequate justification offered by plaintiff for equitable tolling is failure to provide adequate notice. While the information provided by the Minnesota Department of Human Rights may have misled plaintiff and caused him to believe that under the ADEA he had a full year to file his administrative charge, equitable tolling is only appropriate if the failure to file a timely charge is attributable to conduct of the defendant. *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 676 (1991). In regard to the notice of rights issue, based on the evidence provided to the Court to date, a genuine issue of material fact exists whether defendant posted statutorily-required notice. If defendant failed to post notice, the 300-day period was tolled until plaintiff acquired actual knowledge of his right not to be discriminated against on the basis of age. *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950,

952 (8th Cir. 1986). In the absence of posted notice, defendant bears the burden of proving that plaintiff was aware of his rights. *Id.* Plaintiff has offered evidence that he did not become aware of his rights until sometime in the fall of 1990 when he spoke with Stephen Cooper of the Minnesota Department of Human Rights. Second Anderson Aff. ¶ 5. If true, plaintiff filed his administrative claim within 300 days of obtaining actual knowledge of his rights.[5] In short, whether defendant posted notice and whether plaintiff was generally aware of his rights are disputed issues that, on this motion, are construed in plaintiff's favor. *Kyllo v. Farmers Co-Op Co. of Wanamingo Minnesota*, 723 F.Supp. 1332, 1336 (D.Minn. 1989). Thus, for the purposes of this motion, the Court assumes that plaintiff's administrative charge was timely.

If the statute of limitations was tolled, the next issue is whether the putative plaintiffs can piggy-back" their untimely claims to plaintiff's timely claim. The United States Courts of Appeals are split on whether every member of the class must meet the 300-day administrative filing deadline. The rule in the Eighth Circuit is that putative plaintiffs need not personally comply with the filing requirement if one plaintiff in the action has properly filed an administrative charge. *Kloos*, 799 F.2d at 400. *Accord Mistretta v. Sandia Corporation*, 639 F.2d 588, 593-94 (10th Cir. 1980); *Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979). *Contra McCorstin v. United States Steel Corp.*, 621 F.2d 749, 755 (5th Cir. 1980). However, the Eighth Circuit has limited the ability of putative plaintiffs to "piggy-back" their claims on a timely administrative charge of another plaintiff. Because of the purposes behind the administrative filing

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5. Plaintiff filed his administrative complaint on March 25, 1991, which was within 300 days of any date in the fall of 1990.

requirement, namely informal conciliation and a notice of charges, other plaintiffs cannot raise claims that are far beyond the scope of the timely administrative charge. *Ulvin v. Northwestern Nat. Life Ins. Co.*, 943 F.2d 862, 865 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 970 (1992). In short, if plaintiff's claim is shown to have been timely, the putative plaintiffs may "piggy-back" claims that arise out of the same general conduct complained about in plaintiff's administrative charge.

II. *"Similarly Situated"*

Section 216 of the ADEA authorizes class actions to be brought on behalf of "other employees similarly situated." 29 U.S.C. § 216(b); *see also* 29 U.S.C. § 626(b). To satisfy the "similarly situated" requirement plaintiff need not show that his claims are identical to putative class members, only similar. *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613, 616 (S.D.Tex. 1979). "In general, however, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J.), *aff'd*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 110 S.Ct. 482 (1989).

Section 216 alters the general rule for the binding nature of class action judgments. Under Federal Rule of Civil Procedure 23, putative plaintiffs must opt-out of the class or they will be bound by the judgment. Fed.R.Civ.P. 23. Section 216(b), however, provides for the opposite procedure: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Thus, the opt-out procedure of Rule 23 is wholly

inapplicable to ADEA cases. *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986).

Plaintiff argues that the Court should certify this lawsuit as a class action because the putative plaintiffs are "similarly situated." Plaintiff asserts that all putative plaintiffs are similarly situated because they were all over forty years old in 1990, all were professional exempt employees within the Software Engineering Division, a decision to layoff all but one putative plaintiff was reached at the February 7, 1990 meeting, and all were long-time employees of defendant. In regard to the lone proposed plaintiff who was not laid off, James Schaenzer, plaintiff claims that defendant purposely induced him to quit by curtailing his authority and responsibilities. Finally, plaintiff claims that all proposed plaintiffs are similarly situated because they have been affected by the same pattern of conduct.

Defendant does not directly challenge plaintiff's assertion that the other putative plaintiffs are similarly situated as defined by section 216. Instead, defendant offers three general arguments in opposition to certification. First, defendant argues that the Supreme Court's decision in *Sperling* impliedly imposed Rule 23's limits on the Court's authority to certify the class. Rule 23 allows a class action only if joinder is impracticable, there are questions common to the class, the claims of the representative is typical of the class, and the representative will adequately represent the class. Defendant asserts that joinder is not impracticable because there are only thirteen putative plaintiffs, and that he is not an adequate representative of the class because the statute of limitations for court filings (as opposed to administrative filings) bars his claim. Second, defendant argues that allegations alone are not sufficient to justify certification. In support of this argument, defendant again asserts that the

administrative filings were untimely and that the Court should dispose of the case on that basis. Finally, defendant objects to the inclusion of Schaenzer in the class. Schaenzer voluntarily resigned but plaintiff claims that Schaenzer did so because defendant was attempting to force him out by reducing his authority and responsibilities. Defendant argues that Schaenzer is not similarly situated and should not be included in the class. Defendant further asserts that the allegations regarding Schaenzer are hearsay because they are presented in an affidavit of plaintiff's counsel and not by way of an affidavit from Schaenzer.[6]

The Court does not agree with defendant's assertion that the Supreme Court's ruling in *Hoffmann-La Roche Inc. v. Sperling*, 110 S.Ct. 482 (1989), impliedly imposed the requirements of Rule 23 on ADEA class actions.

In *Sperling*, the Supreme Court held that district courts have discretion to facilitate notice in an ADEA class action. This holding is discussed more fully *infra*. In reaching its holding, however, the Court stated that district courts have "the requisite

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6. Plaintiff asks the Court to include Schaenzer in the class based on the following allegations in plaintiff's attorney's affidavit:

> On June 6, 1992 while investigating Plaintiff's claim, I talked to Jim Schaenzer. He told me that in 1990 he was assigned increasingly trivial work, had his supervisory duties taken away, and was given a very small office. He felt he was being targeted and therefore quitting [sic].

Kempf Aff. ¶ 36.

procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, *and not otherwise contrary to statutory commands or the Provisions of the Federal Rules of Civil Procedure.*" 110 S.Ct. at 486 (emphasis added). At least one court has concluded that through this passage the Supreme Court impliedly imposed the requirements of Rule 23 on section 216 class actions. That court reached its conclusion based on the following reasoning:

> I cannot accept the extraordinary assertion that an aggrieved party can file a complaint, claiming to represent a class whose preliminary scope is defined by him, and by that act alone obtain a court order which conditionally determines the parameters of the potential class and requires discovery concerning the members of that class. Before I conditionally determine the scope of the class, plaintiffs will need to satisfy me that there exists a definable, manageable class and that they are proper representatives of the class. They will, in other words, need to show that they satisfy the requirements of rule 23 or convince me that a particular requirement is inconsistent with 29 U.S.C.A. § 216(b).

Shushan v. Univ. of Colorado at Boulder, 132 F.R.D. 263, 268 (D.Colo. 1990).

The Court will not adopt *Shushan's* interpretation of *Sperling* for three reasons. First, the *Shushan* court appears to be the only court in the country to conclude that *Sperling* impliedly imposed the requirements of Rule 23 on ADEA actions. *See, e.g.,*

Anson v. Univ. of Texas Health Science Center, 962 F.2d 539, 540 (5th Cir. 1992); *Church v. Consolidated Freightways. Inc.,* 137 F.R.D. 294 (N.D.Cal. 1991) (discussing *Shushan* at length but rejecting its holding). Second, in an order issued after the *Sperling* decision, another court in this district has stated that "ADEA class actions are not governed by Federal Rule of Civil Procedure 23." *Severtson v. Phillips Beverage Co.,* 137 F.R.D. 264, 265 (D.Minn. 1991), While it appears that the *Severtson* court was not presented with the specific argument offered by defendant, the case is strong persuasive authority that the rule in this circuit continues to be that Rule 23 does not apply to section 216 actions despite the *Sperling* decision. *See Schmidt v. Fuller Brush Co.,* 527 F.2d 532, 536 (8th Cir. 1975). Third, the district court in *Sperling* specifically held that "it is clear that the maintenance of ADEA representative claims . . . is governed by § 216(b) and not Rule 23." *Sperling v. Hoffmann-La Roche. Inc.,* 118 F.R.D. 392, 399 (D.N.J), *aff'd,* 862 F.2d 439 (3d Cir 1988), *aff'd,* 110 S.Ct. 482 (1989). The Supreme Court did not expressly challenge the district court's assertion. Thus, the Court finds that the general statement by the Supreme Court that district courts have "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure," 110 S.Ct. at 486, should not be read to incorporate the procedures of Rule 23 into section 216 actions. *Church,* 137 F.R.D. at 306.

The Court finds that the more appropriate conclusion is that the Rule 23's factors (commonality, typicality, numerosity, and adequacy) are relevant to the Court's analysis of whether the putative plaintiffs are similarly situated, but that the *Sperling* "was [not] intended to invoke, verbatim, the procedures of Rule 23 into all ADEA action [sic] brought under section 216(b)."

Church, 137 F.R.D. at 306. Thus, when conducting an analysis of whether the putative plaintiffs are similarly situated, the Court will consult Rule 23's factors but not be bound by them.

Rule 23 allows a class action only if joinder is impracticable, there are questions common to the class, the claims of the representative is typical of the class, and the representative will adequately represent the class. The parties seem to agree that the commonality and typicality factors are present in the case at bar. The parties disagree, however, as to whether the impracticability and adequacy of representation factors justify certification of the class.

Under Rule 23, the burden is on the plaintiff to show that joinder is impracticable. *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 55 (8th Cir. 1977). The decision on whether joinder is impracticable is within the Court's discretion and in making that determination the Court should consider all the circumstances surrounding the case. *Id.* In this case, plaintiff seeks to bring only thirteen additional people into this lawsuit. While it is widely recognized that the mere number in a class in not controlling on the issue of impracticability of joinder, it is the most important factor. *Independent School Dist. No. 89 v. Bolain Equipment, Inc.*, 90 F.R.D. 245, 247 (W.D.Okla. 1980). The Court believes that the joinder of thirteen identified persons is not impracticable. *See e.g., Ewh v. Monarch Wine Co., Inc.*, 73 F.R.D. 131 (E.D.N.Y. 1977) (joinder of thirty-four to fifty not impracticable); *Stoner v. Ford*, 390 F.Supp. 327 (N.D.Okla. 1974) (joinder of twenty-nine not impracticable). The relatively small size of the class supports a conclusion that joinder is the more appropriate procedural tool. Before reaching this conclusion, however, the Court had to consider a possible obstacle that might render joinder impracticable. The Court was concerned that while piggy-

backing untimely claims to timely claims is allowed in class actions, it might not be allowed if the Court only joined the claims and parties. Accordingly, the Court requested that the parties submit additional briefs on this issue. "Every court of appeals that has addressed the issue has held . . . that plaintiffs who have not timely filed a charge can rely on the timely charge of another plaintiff in a class action *or* in a multiple plaintiff joint action." *Anderson v. Montgomery Ward & Co. Inc.*, 852 F.2d 1008, 1017-18 (7th Cir. 1988) (emphasis in original) (citations omitted). The Eighth Circuit has addressed this issue in the Title VII context in *Allen v. Amalhamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). In *Allen*, thirteen black union members filed suit against the union alleging racial discrimination. The thirteen filed a single suit, but did not seek class certification. The district court denied Title VII relief to all plaintiffs but two because only those two had filed charges with the EEOC and the complaint did not allege a class action or seek class relief. The Eighth Circuit found the district court had erred:

> It is settled that a suit by a named member of a class in a class action may seek relief for the entire class without the necessity of other class members pursuing their administrative remedy with the EEOC. In the instant case, although no class action was filed, 13 additional plaintiffs alleged facts demonstrating they were similarly situated and had received the same discriminatory treatment as [the two plaintiffs that filed charges with the EEOC]. Under such circumstances, particularly where the discrimination is continuing it would be nonsensical to require each of the plaintiffs to

individually file administrative charges with the EEOC.

Id. at 882-83 (citations omitted). *See also Snell v. Suffolk County*, 782 F.2d 1094, 1100-02 (2d Cir. 1986) (adopting single filing rule); *Jackson Seaboard Coast Line R. Co.*, 678 F.2d 992, 1011 (11th Cir. 1982) ("[I]n a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, the co-plaintiff with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement.") (quoting *Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982)); *Foster v. Gueory*, 655 F.2d 1319, 1322-23 (D.C.Cir. 1981) (adopting single filing rule).

Finally, defendant's argument that plaintiff is not an adequate representative of the class is unpersuasive. The Court has carefully reviewed the facts and the law and concludes that plaintiff is an adequate representative of the class.

In short, the Court concludes that plaintiff has satisfied section 216's requirement that all putative plaintiffs be similarly situated. Nevertheless, while Rule 23 does not strictly apply, reference to Rule 23's impracticability of joinder requirement is relevant and appropriate. Given the fact that plaintiff seeks to join thirteen specific persons, all but one of whom was laid off in 1990 from the Software Engineering Division, plaintiff has not established that certification of the class is necessary to vindicate the rights of individual class members, *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), or will serve the interests of judicial economy. *Buford v. American Finance Co.*, 333 F.Supp. 1243 (D.Ga. 1971). The Court concludes that the more

appropriate resolution is to deny the motion for class certification but to allow the putative plaintiffs to join this action.[7]

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. plaintiff's motion for class certification is denied; and

2. putative plaintiffs are authorized to join this action as individually-named parties.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: March 25, 1993

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7. Because the Court will not certify the class, the Court need not address the issue of what type of notice to the class would be appropriate. *See Hoffmann-La Roche Inc. v. Sperling*, 110 S.Ct. 482, 486 (1989).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION FILED DECEMBER 1, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-138

Richard Anderson and Norris Nielsen,

Plaintiffs,

v.

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

ORDER

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich, & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on defendant's motion for summary judgment. The Court finds that there are material factual disputes which preclude summary judgment in this case.

Appendix C

Accordingly, based on all of the files, records and proceedings, and for the reasons stated from the bench at oral argument,

IT IS ORDERED that defendant's motion for summary judgment is denied.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: December 1, 1993

Supreme Court, U.S.
FILED
SEP 19 1995
CLERK

(3)

No. 95-95

In the
Supreme Court of the United States
October Term, 1995

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Petitioner,

vs.

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT

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No. 95-281

SUPREME COURT OF THE UNITED STATES

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Petitioner,

v.

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS AS TO WHETHER AN ACCURATE BUT INCOMPLETE COMMUNICATION FROM A GOVERNMENT OFFICIAL MAY EQUITABLY TOLL THE ADEA CHARGE-FILING DEADLINE.

Respondents concede that the Eighth Circuit Court of Appeals unambiguously held in this case that an accurate, but incomplete, communication from a government official may justify equitable tolling of the ADEA's charge filing deadline. A-14-16. Respondents argue that the Eighth Circuit's holding (and the Eighth Circuit's previous holding in *Warren v. Department of the Army*, 867 F.2d 1156, 1160-61 (8th Cir. 1989)) is consistent with the decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals. Respondents' claim is incorrect: a genuine conflict exists, which this Court can and should resolve granting Unisys' writ of certiorari.

Respondents argue that the Second Circuit Court of Appeals' decisions are in accordance with the Eighth Circuit Court of Appeals' decision in this case. However, Respondents omit any discussion of *Vernon v. Cassadaga Valley Central School District*, 1995 U.S. App. LEXIS 4714 *14-15 (2nd Cir.), in which the Second Circuit rejected the plaintiffs' equitable tolling argument. The Court held that, although an EEOC right to sue letter sent to the plaintiffs was "not a model of clarity," it "was clearer than that sent in *Long*, was correct in its content, and surely did not amount to affirmative misconduct." 1995 U.S. App. LEXIS at * 15. Respondents instead focus on the Second Circuit's previous

decision to reject equitable tolling in *Long v. Frank*, 22 F.3d 54, 58-59 (2nd Cir. 1994). Respondents argue that *Long* is inapposite because "*it was not misleading* because the EEOC's uncertainty stemmed from inconsistent case law." (italics in original). Respondents are correct as to the source of this inconsistency, but miss the point: the EEOC's letter was accurate, but still could mislead a party to act improperly. In this case, the MDHR's letter was also accurate (it contained the correct statute of limitations for the state statute) but could, arguably, mislead a party to act improperly by assuming the federal statute was identical to the state statute. The Eighth Circuit has accepted precisely the type of tolling rejected by the Second Circuit in *Vernon* and *Long*.

Respondents similarly ignore the direct conflict between the Eighth Circuit Court of Appeals' decision in this case and the decision of the Third Circuit Court of Appeals in *Williams v. Army and Air Force Exchange Service*, 830 F.2d 27, 30-31 (3rd Cir. 1987) that a government official's provision of incomplete information is insufficient to justify tolling. Respondents instead focus on the Third Circuit Court of Appeals' decision in *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 754 (3rd Cir.), *cert. denied*, 464 U.S. 852 (1983). Respondents argue that "the key fact [in *Kocian*] was that the allegedly misled claimant had retained an attorney." The Third Circuit later held in *Williams*, however, that precisely the same conclusion is appropriate even if the claimant has not retained counsel. This decision is in direct conflict with that of the Eighth Circuit Court of Appeals in this case.

Respondents also ignore the conflict between the decision of the Tenth Circuit Courts of Appeals in *Mascheroni v. Board of Regents of the University of California*, 28 F.3d 1554, 1562 (10th Cir. 1994) that "the time limits in Title VII "will be tolled *only* if there has been 'active deception' of the claimant regarding procedural prerequisites." (emphasis in original) (citation omitted). The Tenth Circuit concluded that the plaintiff failed to demonstrate the requisite active deception necessary to establish equitable tolling.

Respondents correctly note that the Fifth Circuit Court of Appeals' decision in *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992) was based in part on the fact that the communications at issue were oral. *Conaway* remains the only law in the Fifth Circuit on this issue. *Conaway*, at a minimum, is in tension with the Eighth Circuit Court of Appeals' decision in this case. This "distinction" is illusory. Respondents had previously argued, in support of their shifting claims of equitable tolling, that tolling was appropriate because Stephen Cooper, the Commissioner of the MDHR, had assured Respondent Anderson that he had one year to file a claim of discrimination.

Finally, as discussed in detail in Unisys' initial Brief in support of its petition, the conflict between these positions is particularly important because it will impact upon a tremendous number of lawsuits. The MDHR (and many other federal and state agencies in Minnesota and elsewhere) send out thousands of such letters to potential charging parties, all of whom now may alter the charge-filing deadline under the ADEA and other federal statutes. The potential for abuse under such circumstances is substantial and will have

the effect of making the ADEA statute of limitations a nullity, at the mercy of every state and local agency.

II. THIS COURT SHOULD SETTLE THE ISSUE OF WHETHER A REPRESENTATION OF A STATE OFFICIAL CAN TOLL THE FEDERAL ADEA CHARGE-FILING DEADLINE DESPITE THE EMPLOYER'S COMPLIANCE WITH FEDERALLY IMPOSED NOTICE PROVISIONS.

Respondents note that the MDHR is "in effect acting as the EEOC's representative," a fact which they claim somehow alleviates the threat to the ADEA and other federal statutes posed by the Eighth Circuit Court of Appeals' decision in this case. As is discussed in Unisys's initial Brief in support of its petition (and ignored by Respondents), the fact that the MDHR is the EEOC's agent does not alleviate these problems. The EEOC cannot itself alter the ADEA's statute of limitations, and certainly cannot delegate "authority" to make such alterations to a state agency such as the MDHR. Moreover, the fact that the EEOC and the MDHR have negotiated a worksharing agreement does not prevent the ADEA and other federal civil rights statutes from being subject to the "vagaries of diverse state limitations statutes" previously condemned by this Court in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762-63, 99 S. Ct. 2066, 60 L. Ed.2d 609, 619-20 (1979) and *Occidental Life Ins. Co v. EEOC*, 432 U.S. 355, 371, 53 L. Ed.2d 402, 97 S. Ct. 2447 (1977). Finally, the worksharing agreement will not lessen or limit the impact of this decision; such worksharing agreements have been negotiated by the EEOC and a state agency in nearly every state. This decision may therefore have an impact in a wide variety of different states.

The Eighth Circuit Court of Appeals' decision allows a state official to alter a federal statute of limitations by sending a form letter to prospective plaintiffs that accurately discusses charge-filing requirements under state law, but does not also discuss the federal requirements. This decision allows negligent or incomplete form action by a state official to nullify the effect of federal statutes of limitations. As discussed in Unisys's initial Brief, Congress sought to avoid this sort of interference, and this Court condemned such interference in *Oscar Mayer* and *Occidental Life*. The Eighth Circuit's decision in this case poses grave dangers to the integrity of the statute of limitations of the ADEA in particular and federal civil rights statutes in general.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 20th day of September, 1995.

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